Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JERI LYNN THOMPSON and JOSEPH DESHETRES,

Petitioners,

vs.

MICHAEL STEEN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the law of the case doctrine apply to questions of jurisdiction to decide qualified immunity?

II.

Does the law of the case doctrine prevent readjudication of qualified immunity where there is no substantially different evidence, no contrary decision of applicable law and the original decision was not clearly erroneous?

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PETITION FOR A WRIT OF CERTIORARI

Jeri Lynn Thompson and Joseph Deshetres, by their attorneys, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals by Circuit Judges Alarcon, Kleinfeld and Hawkins is unsigned and reported at 110 F.3d 716 (9th Cir. 1997) (App. 1-21). The opinion of the district court is unreported (App. 96-114).

JURISDICTION

The decision of the court of appeals was filed on April 7, 1997. The petition for rehearing was denied on June 10, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The issue of qualified immunity arises out of a violation of the knock-notice requirement of the Fourth Amendment and California Penal Code § 1531. This case was previously reviewed by the Ninth Circuit and this court denied a petition for writ of certiorari (No. 92-209) brought by respondent Steen from the earlier decision on November 2, 1992. (506 U.S. 965; 113 S.Ct. 439).

STATEMENT OF THE CASE

Jeri Lynn Thompson and Joseph Deshetres, Appellees in *Thompson v. Mahre and Steen*, 110 F.3d 716 (9th Cir. 1997) seek review of the April 7, 1997 Panel decision (Alarcon, J., Kleinfeld, J. and Hawkins, J.) ("Panel II") (App. 1-21). Panel II held that the "law of the case" doctrine did not apply because a previous disposition by a different merits panel ("Panel I") regarding qualified immunity was "from an interlocutory order after trial of the qualified immunity issue and not from an interlocutory order denying a motion for summary judgment." (App. 15).

The district court had jurisdiction of this case by virtue of the constitutional claims raised pursuant to 42 U.S.C. § 1983. 28 U.S.C. § 1331 and § 1343.

1. The Procedural History Of This Case

The procedural history of this case is summarized by the district court in its post jury trial order denying qualified immunity. (App. 100-102). The significant events that have culminated in this petition are set forth chronologically below:

- March 17, 1987 – A SWAT team led by defendant Steen entered the plaintiffs' home at 6:15 a.m., and fired a number of shots. One shot struck plaintiff Deshetres, another shot killed the family's dog, another shot wounded a police officer, and other shots damaged the house and its contents. (App. 73-75).

- February 23, 1988 – This lawsuit was filed in state court and removed to federal court on March 8, 1988. (App. 100).
- March 1, 1989 – The district court heard cross-motions for summary judgment and denied both motions in an order filed July 7, 1989. (App. 31-45)
- December 11-15, 1989 – The district court conducted a hearing (bench trial) on two issues: (1) whether the police officers had probable cause to support the search warrant and (2) whether defendants complied with knock-notice.
- February 9, 1990 – The district court issued an order (App.46-71) determining that a constitutional violation occurred, i.e., a failure to comply with knock-notice.
- March 13, 1990 – The plaintiffs filed a first amended complaint.

- September 5, 1990 – The district court heard defendants' motions for summary judgment including defendant Steen's motion for summary judgment based on qualified immunity.
- December 12, 1990 – The district court filed an order denying qualified immunity as to defendant Steen. (App. 72-95)
- January 4, 1991 – Defendant Steen filed an interlocutory appeal regarding the denial of qualified immunity.
- April 2, 1992 – In an unpublished opinion, No. 91-15055, Panel I (Schroeder, J., Reinhart, J. and Kleinfeld, J.) affirmed. (App. 24-28).
- June 3, 1992 – Steen's Petition for Rehearing and Suggestion for Rehearing En Banc was denied. (App. 29).
- November 2, 1992 – Steen's petition for writ of certiorari to the United States Supreme Court was denied. (App. 30)

- November 8, 1993 – A jury trial commenced. A jury returned an unanimous verdict in favor of the plaintiffs on November 30, 1993 (App. 117-122).
- February 23, 1994 – The district court heard defendants' Rule 50(b) motion. The district court issued an order on June 27, 1994 denying said motion (App. 96-114).
- September 27, 1994 – Judgment was entered on behalf of the plaintiffs. (App. 115-122).
- October 21, 1994 – Defendant Steen filed a notice of appeal. (App. 123-125).
- February 13, 1996 – The parties participated in oral argument before Panel II (Alarcon, J., Kleinfeld, J. and Hawkins, J.).
- April 7, 1997 – A published opinion was filed reversing the judgment on the basis of qualified immunity. (App. 1-21).
- June 10, 1997 – Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc Was Denied. (App. 22-23).

2. Facts Material To Consideration Of The Questions Presented

By stipulation the parties, early in this case, agreed to participate in an evidentiary hearing (bench trial) for purposes of resolving two legal issues: (1) whether the police officers had probable cause to support the search warrant used to enter plaintiffs' residence and (2) whether defendants complied with the knock-notice entry requirement in serving the warrant. (App. 46). During a four-day hearing in December 1989 only police officers, including respondent Steen, testified. Their testimony was undisputed and unrebutted by the plaintiffs. Following the hearing the district court issued a lengthy order, including a fact-specific analysis, holding that (1) the warrant was supported by probable cause and (2) defendant Steen failed to comply with knock-notice and said failure was not excused by exigent circumstances. (App. 46-71). The issue of qualified immunity was not decided at that time regarding the knock-notice determination.

What followed were amendments to the complaints of the consolidated cases of Thompson and Deshetres (App. 100-101). Then the remaining defendants brought a motion for summary judgment as to the remaining claims. Steen's summary judgment motion based on qualified immunity was denied. (App. 78-81).

An interlocutory appeal followed. A Ninth Circuit Panel (Panel I), in an unpublished opinion, held that it had jurisdiction to review Steen's appeal from an order

denying summary judgment based on qualified immunity. (App. 25). Panel I went on to affirm the district court's ruling. (App. 24-28).

> "The district court did engage in the kind of fact-specific analysis required by *Anderson v. Creighton*, 483 U.S. 635, 641 in assessing whether Sergeant Steen's conduct was objectively reasonable. Appellant has not set forth any legal or factual basis to undermine the district court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity. Accordingly, we affirm." (App. 27-28).

Panel I specifically noted that: "The result of our affirmance on this interlocutory appeal of the district court's denial of a summary judgment motion based on qualified immunity issue is to return the qualified immunity issue to the district court for determination on its merits." (App. 28).

Following a jury trial and verdict for the plaintiffs the district court considered Steen's Rule 50 (b) motion for qualified immunity. The district court again ruled that defendant Steen's failure to comply with knock-notice was not excused by exigent circumstances. "None of the evidence cited from the trial was significantly different from the evidence available at the four-day evidentiary hearing." (App. 109).

A second appeal to the Ninth Circuit followed. A different merits panel reversed the judgment for the plaintiffs on the basis of qualified immunity without addressing the law of the case doctrine. Rather, Panel II

reasoned that the previous disposition was of no significance because Panel I lacked jurisdiction to review the issue of qualified immunity.

> "Because our previous disposition was in substance an appeal from an interlocutory order after trial of the qualified immunity issue, and not from an interlocutory order denying a motion for summary judgment, the question of jurisdiction over the latter type of interlocutory appeal, resolved by *Johnson v. Jones*, does not bear on our earlier disposition. We need not consider whether, at the time of our earlier disposition, lack of a Rule 54(b) determination impaired our jurisdiction. No law of the case issue arises, because our previous disposition left open the issues we resolve today." (App. 15).

REASONS FOR GRANTING PETITION

1. Introduction

The law of the case doctrine benefits the courts and litigants for many sound policy reasons. It has particular significance when coupled with the doctrine of qualified immunity. Appeals from district court orders denying qualified immunity are immediately appealable under the collateral order doctrine only when based on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Orders are based on an issue of law when they concern only application of established legal principles, such as whether an official's conduct was objectively reasonable in light of clearly established law to a given (for purposes

of appeal) set of facts. *Johnson v. Jones*, 515 U.S. ___, 115 S.Ct. 2151, 2156 (1995).

Qualified immunity should be adjudicated "as early as possible, ordinarily before trial and substantial discovery, to give the beneficiaries of the doctrine immunity from litigation and not merely from judgment." *Mitchell v. Forsyth*, 472 U.S. at 526. A defendant may bring multiple interlocutory appeals asserting a defense of qualified immunity. *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834 (1996).

Cases brought alleging violations of constitutional rights by state actors, *Monroe v. Pape*, 365 U.S. 167 (1961), or federal officials, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), often raise important issues that define our unique system of government. In such cases qualified immunity and interlocutory appeals help serve the interests of a government defendant to terminate meritless litigation early on in the case. This interest is weighed against the significant delays and expenses associated with pretrial appeals that can "ossify civil rights litigation." *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990). This Court in *Behrens* recognized that: "Undeniably, the availability of a second appeal affords an opportunity for abuse. . . . " 116 S.Ct. at 840. To protect against such foreseeable abuses the courts of appeal are relied upon to "weed out" frivolous appeals. *Id.* at 841.

Behrens' invitation to bring multiple appeals potentially serves to encourage an expectation by defendants that a different appellate court panel may look more favorably on second bite of the qualified immunity apple. Multiple appeals also risk a duplication of efforts and a

waste of appellate resources. Within this context the law of the case doctrine has particular significance.

It is now more likely that appellate courts, as in this case, will be required to consider the same question regarding qualified immunity more than once in the same case. The interests of fairness to litigants, decisional finality, and judicial economy balance in favor of clearly and explicitly announcing the manner in which the law of the case doctrine will apply to questions of jurisdiction, and prior rulings, regarding qualified immunity. These important issues should be decided by this Court sooner rather than later.

Against this backdrop this petition seeks review of a published Ninth Circuit opinion that is in conflict with pre-existing Ninth Circuit precedent *and* a decision of another United States Court of Appeals on the same important matter, i.e., the application of the law of the case doctrine to qualified immunity. In addition, petitioners ask this Court to exercise its supervisory power because the Ninth Circuit has far departed from the accepted and usual course of judicial proceedings with respect to the application of the law of the case doctrine.

2. The Law Of The Case Doctrine Should Apply To Questions Of Jurisdiction To Decide Qualified Immunity

In this case the Ninth Circuit (Panel II) acknowledged that the issue of qualified immunity was previously reviewed and decided by an earlier merits panel. (App. 9-10). Panel II then went on to provide a two-part rationale for not applying the law of the case doctrine to the

second appeal of the same qualified immunity issue under the same undisputed facts. First, Panel II held that Panel I did not have jurisdiction because the first appeal was not from an order denying summary judgment. Alternatively, Panel II appeared to reason that this Court's decision in *Johnson v. Jones* represented an intervening change in the law making the law of the case doctrine inapplicable.

Under either scenario the law of the case doctrine should apply because Panel I had jurisdiction to decide qualified immunity. Assuming the initial appeal to the Ninth Circuit was from a bench trial, rather than a motion for summary judgment, the Ninth Circuit had jurisdiction. *Behrens*, ___ U.S.___, 116 S.Ct. 834 (1996). Second, the record demonstrates that the initial appeal was in fact from a motion for summary judgment. Accordingly, Panel I had jurisdiction. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Finally, Panel I ruled that it had jurisdiction and affirmed the district court's order denying qualified immunity. That determination of jurisdiction should constitute the law of the case on that issue.

A. The Panel II Decision (*Thompson v. Mahre And Steen*, 110 F.3d 716) Is Inconsistent With Existing Ninth Circuit Precedent.

The Ninth Circuit has previously held that the law of the case doctrine applies to questions of jurisdiction. *Ferreira v. Borja*, 93 F.3d 671 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 972 (1997); *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1375 (9th Cir. 1990); *Hanna Boys Center v. NLRB*, 853 F.2d 682, 685 (9th Cir. 1988).

In *Ferreira*, the Ninth Circuit squarely addressed the issue – whether the decision of a prior merits panel, which held that it had jurisdiction, constitutes the law of the case.

> "In that situation, we conclude that the law of the case applies." *Cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816-817 n.5 (1988) (stating that law of the case principles apply to transfer decisions, including transfer decisions that implicate the transferees' jurisdiction)". *Ferreira v. Borgia*, supra, at 674.

B. The *Thompson* Decision Is In Conflict With A Recent Decision Of The Tenth Circuit.

In *Wilson v. Meeks*, 98 F.3d 1247 (10th Cir. 1996), the estate and family of an individual who was shot and killed during a confrontation with city police officers brought a section 1983 action. The district court denied that portion of a motion for summary judgment which defendants sought based on qualified immunity. Defendants appealed. The Court of Appeals, 52 F.3d 1547, reversed and remanded. On remand the district court granted summary judgment in favor of defendants. Plaintiffs appealed. On appeal plaintiffs argued that *Johnson v. Jones* represented an intervening controlling change in the applicable law that would obviate the doctrine of the law of the case. The Tenth Circuit addressed that issue by analyzing the "extent and impact of *Johnson's* reach" as clarified in *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 842 (1996). The court in *Wilson* held:

"Because this Court had appellate jurisdiction to decide *Wilson I* under *Johnson*, we hold that *Johnson* does not represent an intervening change in the law making the exception to the law of the case doctrine inapplicable. Accordingly, *Wilson I* governs this second appeal." 98 F.3d at 1252.

3. The Law Of The Case Doctrine Should Apply To The Issue Of Qualified Immunity Where There Is No Substantially Different Evidence, No Contrary Decision Of Applicable Law And The Original Decision Was Not Clearly Erroneous

Tossing in the wake of *Mitchell v. Forsyth*, 472 U.S. 511, (1985), *Johnson v. Jones* 515 U.S. ___, 115 S.Ct. 2151 (1995) and *Behrens v. Pelletier* ___ U.S. ___, 116 S.Ct. 834 (1996) is the slippery question of whether the judicial doctrine of the law of the case applies to the appellate review of orders rejecting the defense of qualified immunity. *Behrens* reasons that

" . . . resolution of the immunity question may 'require more than one judiciously timed appeal,' because the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is defendants' conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. Rule. Civ. Proc. 56, and the court looks

> to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." *Behrens*, 116 S.Ct. at 840.

Given the right to multiple interlocutory appeals from subsequent orders denying qualified immunity, the problem concerning the application of the law of the case doctrine inevitably arises. To what extent is a subsequent panel bound by the decision of a preceding panel? If the first panel merely reviewed the denial of a motion to dismiss and the second panel is asked to review the denial of a motion for summary judgment, then both the law of the case and the scope of review are distinguishable by virtue of the above-quoted rationale in *Behrens*. On the other hand, *Behrens* does not instruct us on the application of the law of the case when a subsequent panel reviews an order regarding the denial of qualified immunity where there is no substantially different evidence, no contrary decision of applicable law and the original decision was not clearly erroneous.

It is generally accepted that under the law of the case doctrine, "one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir. 1979). "The law of the case is a judicial doctrine designed to promote decisional finality. Once a court decides an issue, the doctrine comes into play to prevent the re-litigation of that issue in subsequent proceedings in the same case." *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir. 1995) (citing *Arizona v. California*, 460 U.S. 605, 618-619 (1983)). "An appellate court cannot efficiently perform its duty to provide expeditious justice to all 'if a

question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' " *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-663 (5th Cir. 1974). Finally, "no litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time." *Gindes v. United States*, 740 F.2d 947, 949 (Fed.Cir.1984) (quoting *United States v. Turtle Mtn. Band of Chippewa Indians*, 612 F.2d 517, 520 (Court of Claims 1979).

In this case, defendant Steen appealed the district court's order denying his motion for summary judgment based upon qualified immunity. Panel I affirmed the district court's order. In the memorandum opinion issued by Panel I, it indicated that in reviewing the district court's order it also considered a prior order of the district court following a bench trial to determine whether the forcible entry, instigated by Steen, violated the Fourth Amendment prohibition against unreasonable search and seizure. At all times throughout the history of this case, it was undisputed that the police officers, after announcing their arrival at plaintiffs' home, waited only seven to ten seconds before beginning their forcible entry with a battering ram. The district court concluded that this was not in compliance with the knock-notice requirement. (App. 60-64, 78-81). The district court also reviewed the undisputed evidence presented during the bench trial and found that no exigent circumstance excused Steen's failure to comply with the knock-notice requirement. (App. 65-70, 78-81).

Panel I, in analyzing the district court's factual findings following the bench trial, commented that these findings "are not clearly erroneous" and that the conclusion of the district court "is sound." (App. 27)

Panel I next took up the question of whether the district court erred in denying defendant's motion for summary judgment based upon qualified immunity. In so doing, Panel I stated: "Appellant has not set forth any legal or factual basis to undermine the district court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity." (App. 27-28)

At this point in the proceeding, one must ask: (1) Does the law of the case doctrine apply to Panel I's opinion? and (2) If so, what is the law of the case as promulgated by Panel I's opinion?

Of course, under the doctrine of the law of the case, the front door is always open for new circumstances justifying a departure from the law of the case. *Vaughan v. Ricketts*, 950 F.2d 1464, 1468 (9th Cir. 1991) (finding of no qualified immunity not law of the case where jury finds allegations upon which no qualified immunity was based are not necessarily true). What the law of the case does is bar the back door in order to prevent the escape of that portion of the case which has been reviewed and affirmed by a prior panel. The open door policy applied by Panel II is too precarious a breach to sustain the integrity of the law of the case.

The circumstances justifying a departure from the law of the case are narrow. *Wilson v. Meeks*, 98 F.3d 1247 (10th Cir. 1996), in reviewing the attenuated conditions under which a court may dispense with the law of the

case, cited *United States v. Monsesvais*, 946 F.2d 114, 117 (10th Cir. 1991). In *Monsesvais*, former 10th Circuit Chief Justice Oril Phillips pointed out that the law of the case must be followed "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."

These three circumstances leave the door open for a subsequent panel to disregard the law of the case. Panel I left the door open (App. 28) and the district court revisited the issue of qualified immunity prior to closing arguments to the jury and also following the jury verdict.

Thereafter, the district court, in part, found as follows:

> "The Court has resolved many of the factual allegations regarding the presence of exigent circumstances here. *Indeed, none of defendants' arguments present new facts or legal arguments* which require the Court to alter its prior Orders. (App. 107) (emphasis added)
>
> " . . . all of Steen's contentions must fail. *None of the evidence cited from the trial was significantly different from the evidence available at the four day evidentiary hearing*. The Court's February 9, 1990 Order considered a variety of exigent circumstances. . . . That Order concluded that defendants' failure to comply with the knock-notice requirement was not 'excused by exigent circumstances.' " (App. 109-110) (emphasis added)
>
> "Defendants' experts did not offer new insights into the specific situation confronting Officer Steen." (App. 110)

From the foregoing excerpts, one can see that the undisputed evidence reviewed by Panel I remained undisputed and unchanged throughout the balance of the case. In the absence of substantially different evidence at a subsequent trial, the law of the case established by Panel I should prohibit reexamination of the issue of qualified immunity by Panel II.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 27, 1997

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, Individually and as Guardian ad Litem for Nicole L. Thompson, a Minor; NICOLE LEAH THOMPSON, a Minor; and JOSEPH DESHETRES, *Plaintiffs-Appellees,* v. LARRY WAYNE MAHRE, et al., *Defendant,* and MICHAEL STEEN, Defendant-Appellant.	No. 94-16912 D.C. No. CV-88-00874-DLJ OPINION

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted
February 13, 1996 – San Francisco, California

Filed April 7, 1997

Before: Arthur L. Alarcon, Andrew J. Kleinfeld and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Kleinfeld

SUMMARY

Torts/Government Law

The court of appeals reversed a judgment of the district court. The court held that the "knock-notice" requirement does not apply when officer execute a search warrant at the home of a notoriously violent suspected drug trafficker who may have received a warning of impending police action.

Police obtained a warrant to search the residence of appellee Joseph Deshetres for evidence of methamphetamine dealing. As reflected in the supporting affidavit, the officers knew that Deshetres had a history of arrests for narcotics, illegal possession of guns, assault, armed robbery, and interference with a police officer.

A pickup truck drove away from Deshetres' house as the police approached. Appellant Michael Steen, the officer in charge, concluded that Deshetres may have been warned of the impending police action and decided not to allow the occupants of the house time to respond after announcing the police presence.

At the door to the house, one of the officers shouted that they were police. Steen ordered the officers to break through the door without waiting for Deshetres to open it. Shooting began. Deshetres, his family dog and an officer were shot by police officers. Appellee Jeri Thompson, Deshetres' girlfriend, was held at gunpoint and forced to hand her baby through a broken window and crawl out after it.

In the ensuing criminal proceedings, the municipal court granted Deshetres' motion to suppress the evidence and dismissed the charges, ruling that the exigency exception to the "knock-notice" requirement did not apply.

Deshetres, Thompson, and the baby sued the police and Steen under 42 U.S.C. § 1983 for violations of their civil rights. Steen moved for summary judgment on the ground of qualified immunity. The parties stipulated to bifurcation and bench trial of the qualified immunity issue. The district court conducted an "evidentiary hearing," finding that it was reasonable for the officers to believe that they would be met with armed resistance and that Deshetres had been warned. However, the court concluded that the exigency exception did not apply.

On interlocutory appeal by Steen, the court of appeals affirmed, leaving the qualified immunity issue for the district court to determine on the merits.

A jury returned a verdict against Steen, awarding damages to Deshetres and Thompson. Steen appealed, contending that he was entitled to judgment as a matter of law based on qualified immunity.

[1] Ordinarily there is no evidentiary hearing or findings of fact on a summary judgment motion. Summary judgment may be granted if there is no genuine issue as to any material fact. When there is a genuine issue, trial is the means of determining what is true. What are sometimes loosely called "findings" on summary judgment are instead facts as to which there is no genuine issue.

[2] The words used by the lawyers and the district court, such as "evidentiary hearing" and "findings of

fact," made the procedure sound like an evidentiary hearing on a motion to suppress. Even though lawfulness of a search was the subject of the proceeding, there is no summary judgment analogue to that criminal procedural device. In a suppression hearing, the question is admissibility of evidence. In a § 1983 case, the same evidence is typically considered not with regard to admissibility, but with regard to whether a reasonable police officer would have believed his or her conduct to be constitutionally permissible. When there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue, the Seventh Amendment, require submission to a jury.

[3] A defendant in a civil case, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as it determines whether or not the pretrial record sets forth a genuine issue of material fact. When the denial determines only a question of what facts a party may or may not be able to prove at trial, the order is not appealable. If there is a genuine issue of fact, and the determination is one of whether given facts show a violation of clearly established law, interlocutory appeal remains available.

[4] Denial of a defense motion for summary judgment on qualified immunity leaves the issue for trial and does not destroy the defense. Only the grant of summary judgment or other dispositive pretrial device can withdraw the issue from trial. [5] Had the district court merely denied Steen's motion for summary judgment on qualified immunity, it would have been mistaken to take the issue away from the jury. Steen would have been

entitled to have a jury decide whether his conduct fell within the exigency exception.

[6] Denial of a summary judgment motion is not what happened. Instead, the parties stipulated to bifurcation and bench trial of the qualified immunity issue. Although the parties termed the ensuing proceeding an "evidentiary hearing," it was a trial by the court of a separate issue pursuant to stipulation. By stipulating to and participating in this proceeding, Steen waived the right to trial by jury of issues of fact relating to qualified immunity. What took place was a trial on the issue of qualified immunity, not summary judgment denying qualified immunity. The district court's findings were findings of fact, not merely determinations of facts not genuinely at issue.

[7] At the time of the police entry, California and federal statutes provided that a police officer may break into a house to execute a warrant "if after notice of his authority and purpose he is refused entrance." It was undisputed that Steen ordered the break-in without giving notice of a purpose and without giving the householders an opportunity to permit peaceful entry. [8] The issue arose out of the exigency exception to the constitutional "knock and announce" requirement. When police reasonably believe themselves to be endangered because the defendant had previously expressed willingness to use firearms against police and was known to have them, the exigency exception applies.

[9] The officers had probable cause to believe that Deshetres had methamphetamine in the house. If he knew the police were coming, he could have flushed it

down the toilet. Steen had reason to believe that Deshetres was a career criminal, had robbed a narcotics dealer, and had reached for a gun while being arrested. The police also had reason to believe that the driver of the pickup had tipped off Deshetres.

[10] The district court's findings of fact compelled the conclusion that the exigent circumstances exception applied. [11] Steen was not required to establish that he was correct in thinking that the police would be met with force or evidence would be destroyed. He had qualified immunity if a reasonable officer could have believed forcible entry to be necessary to protect the officers against armed resistance and the evidence against destruction.

[12] Steen had reason to believe that Deshetres had armed himself, was a violent person, knew that the police were about to enter, might forcibly resist, and might flush his methamphetamine down the toilet. In those circumstances, the exigency exception applied. [13] This was not to say that Steen's judgment was correct. The question was whether a reasonable officer could have made Steen's judgment. Steen was entitled to qualified immunity.

COUNSEL

Rene Auguste Chouteau, City Attorney, and Patrick C. Wilson, Assistant City Attorney, Santa Rosa, California, for the defendant-appellant.

Leroy J. Lounibos, Jr., Lounibos, Lounibos & Tinney, Petaluma, California, for plaintiff-appellee Thompson.

John Houston Scott, Prentice & Scott, San Francisco, California, and Andrew Unetic, Santa Rosa, California, for plaintiff-appellee Deshetres.

OPINION

KLEINFELD, Circuit Judge:

This is a qualified immunity case arising out of an early morning execution of a search warrant. Two issues arise, the procedure to be followed, and the exigency exception to the knock and announce requirement.

A. Facts.

Joseph Deshetres, whose house was the object of the search, was a member of a motorcycle gang thought by the police to be violent, and he had a substantial criminal record. The police had probable cause to believe that Deshetres had sold methamphetamine, and would have evidence of his methamphetamine dealing at his house. The search warrant affidavit says that Deshetres had a record of numerous arrests, for narcotics, illegal possession of guns, assault, robbery, and interference with a police officer. The year before the raid on his house, Deshetres was arrested as he robbed a drug dealer with a gun and tried to escape with a hostage.

In the raid that led to the instant case, a large number of police surrounded Deshetres's house at six in the morning. They correctly anticipated that Deshetres and anyone else in the house would be asleep. At the door, an officer hollered that they were police. At the direction of Sergeant Steen, the officer in charge that morning, the

officers did not wait long enough so that if Deshetres were going to open the door voluntarily, he could have done so. Instead, the police broke through the door to the house with a battering ram.

Shooting began immediately. Deshetres came out of the bedroom naked, carrying a gun. One of the police shot him. Deshetres did not fire any shots. One officer accidentally shot another police officer. The police also killed the family dog.

Deshetres's girlfriend, Thompson, sat terrified in bed in her T-shirt an panties, holding a baby, while one of the policemen kept a gun pointed at her and told her not to move. Then she was ordered to hand the baby out the window the police officer had broken, and crawl out after it.

Sergeant Steen had decided as the police approached the house not to allow the people in the house time to respond after announcing the police presence. The factor which tipped his judgment was that a white pickup truck drove away from the house as the police approached, so Sergeant Steen thought it likely that Deshetres had been tipped off.

The jury decided in a series of special verdicts that had Sergeant Steen waited another 20 to 23 seconds before ordering forced entry, Deshetres or Thompson would have responded and permitted the Santa Rosa police to enter. As a result of the failure to wait, Sergeant Steen was required to pay Deshetres $82,500 dollars in damages for his being shot and hospitalized nine days and other damages, and $10,000 dollars to Thompson.

B. Procedure.

The procedural history of this case is complex and obscure. The district court decided on qualified immunity early in the litigation, in accord with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). Sergeant Steen appealed, and we affirmed. Our unpublished disposition is excerpted in the footnote.[1]

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[1] "This appeal arises out of a rather complex 42 U.S.C. § 1983 action involving forcible entry of a residence used as a motorcycle gang clubhouse. At issue here is solely the question whether the district court erred in denying Sergeant Steen's *motion for summary judgment* based on qualified immunity. *We have jurisdiction of an appeal from an interlocutory order for such review.*

. . . .

"Before the district court considered Steen's motion for summary judgment, it held an *evidentiary hearing* to determine, inter alia, whether the forcible entry, instigated by Sergeant Steen, violated the Fourth Amendment prohibition against unreasonable searches and seizures.

. . . .

"The district court found that no exigent circumstance excused Sergeant Steen's failure to comply with the knock-notice requirement. There was no objective basis for the police to believe that many people were inside the house prepared to give armed resistance, nor was there any indication that evidence was being destroyed or that occupants were attempting to escape. The police were positioned to act, however, had any one of these exigencies developed. . . . The court considered whether the warning [from the white pickup truck driver], without independent evidence of armed resistance or evidence destruction, created exigent

We have received an amicus curiae brief in this case from 176 California cities and towns concerned about tort liability for execution of search warrants. The amici urge that the district court erred by taking qualified immunity away from the jury and resolving the facts on summary judgment. Amici cite a Sixth Circuit case, *Kennedy v. City*

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circumstances. The court found that the warning was so close in time to the officers' announcement at the front door, that the warning coupled with the few seconds the police waited after their announcement, would have given the plaintiffs no more time to respond to the officers' arrival, than the plaintiffs would have had if the officers had complied with the knock-notice requirement. Therefore, it was not objectively reasonable for Sergeant Steen to believe that the presumed warning from the pickup truck driver, in the absence of any other perceived risk of violence or destruction of evidence, created any sort of exigency. . . . Based upon the district court's factual findings, which are not clearly erroneous, that conclusion is sound.

. . . .

"Appellant has not set forth any legal or factual basis to undermine the district court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity. Accordingly, we affirm. *The result of our affirmance on this interlocutory appeal of the district court's denial of summary judgment motion based upon qualified immunity is to return the qualified immunity issue to the district court for determination on its merits. We express no view on those merits here, nor do we resolve whether the course of future proceedings is limited by an understanding reached by the parties, by any waiver arising from the parties's conduct in prior proceedings, or by any prior ruling of the district court which may obviate the need for further evidentiary proceedings."*

Thompson v. Mahre and Steen, No. 91-15055, unpublished memorandum, April 2, 1992. (Emphasis added.)

of Cleveland, 797 F.2d 297 (6th Cir. 1986), for the proposition that denial of defendant's motion for summary judgment on qualified immunity means only that the issue goes to trial on the merits, not that qualified immunity is lost.

[1] There are several puzzling things about the procedure described in our previous memorandum disposition. First, ordinarily there is no such thing as an evidentiary hearing, or findings of fact, on a summary judgment motion. Under Federal Rule of Civil Procedure 56(c), a summary judgment may be granted if there is "no genuine issue as to any material fact," but not if there is a genuine issue. Where there is a genuine issue, trial rather than summary judgment is the means of determining what is true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). It follows that there is no such thing as a finding of fact on summary judgment. What are sometimes loosely termed "findings" are instead facts as to which there is no genuine issue. *See generally Anderson*, 477 U.S. at 255 & n.6.

[2] The words used by the lawyers and district judge, such as "evidentiary hearing" and "findings of fact," make the procedure they used sound like an evidentiary hearing on a motion to suppress. But even though lawfulness of a search was the subject of the proceeding, there is no summary judgment analogue to that Federal Rule of Criminal Procedure 12(e) device. In a suppression hearing, the question is admissibility of evidence, ordinarily determined by the court outside the presence of the jury. Fed. R. Evid. 103(c), 104(a). In a

section 1983 case, the same evidence is typically considered not with regard to admissibility, but rather with regard to whether a reasonable police officer would have believed his or her conduct to be constitutionally permissible. "[T]he determination whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court." *Act Up!*, 988 F.2d at 873. This is a substantive question rather than one of admissibility of evidence. Thus, where there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury. *See, e.g., Collins v. Jordan*, 102 F.3d 406, 412 (9th Cir.), as amended, slip op. 3053, 3068-69 (1997); *Stivers v. Pierce*, 71 F.3d 732, 749-50 (9th Cir. 1995). District courts may in their discretion "sparingly and with great care" take oral testimony under Federal Rule of Civil Procedure 43(e) on a summary judgment motion. 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2723, at 62 (2d ed. 1983). Oral testimony cannot, under Federal Rule of Civil Procedure 56, lead to a finding on a genuinely disputed fact, but only a determination as to which facts are not genuinely disputed. That is probably why the taking of oral testimony on summary judgment is so rare – it would ordinarily be a waste of time.

The procedural aspect of qualified immunity has been problematic to district courts, because of the requirement that qualified immunity be adjudicated as early as possible, ordinarily before trial and substantial

discovery, to give the beneficiaries of the doctrine immunity from litigation and not merely from judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1991) ("a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . The entitlement is an *immunity from suit* rather than a mere defense to liability.") (emphasis in original).

[3] Recently the Supreme Court offered a clarification which, had it come down a few years earlier, might have precluded the interlocutory appeal in the case at bar. *Johnson v. Jones*, 115 S. Ct. 2151 (1995), holds that a defendant in a civil case, "entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 2159. The Court in *Johnson* affirmed a Seventh Circuit dismissal of an interlocutory appeal by police officers who were denied summary judgment on qualified immunity because of a genuine issue of fact. *Johnson* limits the holding in *Forsyth*, that a denial of summary judgment is immediately appealable. Where the denial determines only a question of evidence sufficiency, that is, what facts a party may or may not be able to prove at trial, the order is not appealable. If there is no genuine issue of fact, and the determination is one of whether certain given facts show a violation of clearly established law, interlocutory appeal remains available under *Mitchell v. Forsyth* despite the qualification added by *Johnson v. Jones*. *Id.* at 2155, 2159.

[4] We agree with amici that denial of a defense motion for summary judgment on qualified immunity merely leaves the issue for trial, and does not destroy the

defense. *Johnson v. Jones*, 115 S. Ct. 2151, 2158-59 (1995). Only the grant of summary judgment or other pretrial dispositive device can withdraw the issue from trial.

[5] Amici correctly point out that the jury in the case at bar was not given the qualified immunity issue. The district court instructed the jury that it had already determined that Sergeant Steen "violated the applicable knock-notice law when he did not wait a sufficient period of time, under the circumstances, before ordering entry into the residence. . . . The question for you to determine as to this claim is whether or not the conduct of defendant Steen caused any damage to the plaintiff Deshetres and plaintiff Thompson." Had the district court merely denied Sergeant Steen's motion for summary judgment on qualified immunity, then it would have been mistaken to take the issue away from the jury. Sergeant Steen would have been entitled to have a jury decide whether his conduct fell within the exigency exception to the knock-notice rule.

[6] Sergeant Steen did not appeal on the procedural ground urged by amici. We have pored over the record with considerable effort, and determined despite some confusing word usage, what we thought had happened in our previous disposition – denial of a summary judgment motion – and what the amici thought had happened, is not really what happened. Instead, in the course of pretrial proceedings, the parties stipulated to bifurcation and bench trial of the qualified immunity issue. Though the parties and the court loosely termed the ensuing proceeding an "evidentiary hearing" on qualified immunity, it was a "separate trial of . . . any separate issue" pursuant

to stipulation and permitted in the district court's discretion under Federal Rule of Civil Procedure 42(b). Such a separation requires that the court "[p]reserve inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution." *Id.* But the parties stipulated that the "evidentiary hearing" be conducted by the judge without a jury. By stipulating to and participating without objection in this proceeding, Sergeant Steen waived the right to trial by jury of issues of fact relating to the qualified immunity issue under Federal Rule of Civil Procedure 38(d). *See White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (plaintiff waived his right to jury trial by participating without objection in bench trial). Thus what took place was not a summary judgment denying qualified immunity, but rather a trial on the issue of qualified immunity, to the court without a jury. The district court's findings, therefore, were properly denoted as findings of fact and were not merely determinations of facts not genuinely at issue. *See* Fed. R. Civ. P. 52(a). The district court thus did not make the error claimed by amici.

Because our previous disposition was in substance an appeal from an interlocutory order after trial of the qualified immunity issue, and not from an interlocutory order denying a motion for summary judgment, the question of jurisdiction over the latter type of interlocutory appeal, resolved by *Johnson v. Jones*, does not bear on our earlier disposition. We need not consider whether, at the time of our earlier disposition, lack of a Rule 54(b) determination impaired our jurisdiction. No law of the case issue arises, because our previous disposition left open the issues we resolve today.

C. Denial of Qualified Immunity.

Sergeant Steen argues that he should have been granted judgment as a matter of law under Federal Rule of Civil Procedure 50(a), because there was no "legally sufficient evidentiary basis" for denying him qualified immunity. The standard of review is somewhat difficult to apply. Whether a right is "clearly established" so that a public official who violated that right would have no qualified immunity is a question of law reviewed *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Findings of fact are ordinarily reviewed for clear error, but application of law to the facts to determine whether on those facts, qualified immunity is established, is reviewed *de novo*, because the determination of qualified immunity on facts not genuinely at issue is for the court. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Despite the characterization of the review as *de novo*, however, the party that prevailed at trial is entitled to have the evidence construed in a light most favorable to it, and the question is whether the evidence was so one-sided that one party would have to prevail as a matter of law. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989).

[7] Both a California statute, California Penal Code § 1531, and a federal statute, 18 U.S.C. § 3109, provided at the time of the police entry that in this case that a police officer may break into a house to execute a warrant, "if after notice of his authority and purpose he is refused admittance." It is undisputed that Sergeant Steen ordered the break-in without giving notice of a purpose executing a warrant, and without giving the householders,

Deshetres and Thompson, an opportunity to permit peaceful entry.

The "knock and announce" requirement is of very ancient common law origin, traceable to a statute of 1275 which itself was "but an affirmance of the common law." *Wilson v. Arkansas*, 514 U.S. 927, ___, 115 S. Ct. 1914, 1917 (1995). It is part of the "reasonableness inquiry under the Fourth Amendment," and is not merely a statutory requirement. *Id.* at ___, 115 S. Ct. at 1918.

[8] The issue in this case arises out of the exigency exception to the constitutional "knock and announce" requirement. *See Id.* at ___, 115 S. Ct. at 1918-19. Where a defendant is "in possession of narcotics, which could be quickly and easily destroyed," and the facts indicate that "he might well have been expecting the police," the special exigency of preventing destruction of evidence may excuse failure to knock and announce. *Ker v. California*, 374 U.S. 23, 40 (1963). Likewise, where the police officers reasonably believe themselves to be endangered because the defendant had previously expressed willingness to use firearms against police and was known to have them, the exigency exception applies. *United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1991). *See also United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir. 1985); *United States v. Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983).

[9] It is undisputed that the officers had probable cause to believe that Deshetres had methamphetamine in the house. That was the basis for the search warrant. If he knew the police were coming, he could flush it down the toilet. It is also undisputed that Sergeant Steen had reason to believe that Deshetres was a career criminal who

had once robbed a narcotics dealer with a gun and taken a hostage, and had once been reaching for a gun while being arrested. The police also had reason to think that the driver of the white pickup truck had tipped Deshetres off, so he had additional time to destroy evidence and arm himself.

So far, applicability of the exigency exception seems open and shut. But two courts which know this case better than we do reached the opposite conclusion. The Sonoma County Municipal Court after an eight-day hearing on a motion to suppress, granted the motion and dismissed the charges against Deshetres. The district court after a three-day evidentiary hearing likewise concluded that the exigency exception did not apply. After the fact, it is certainly difficult to justify all the shooting, the accidental shooting of a police officer, the great danger to Thompson and her baby, the shooting of the family dog, and all the destruction in the house, for this methamphetamine arrest. Thompson testified that it was very hard to wake Deshetres up for the police, because he had drunk a pint of whiskey heavily the night before. Although Deshetres did have a gun in his hands when he was arrested, he did not shoot at anyone. The entire risk of an officer being shot (though not destruction of evidence) could have been avoided by calling Deshetres on the phone and besieging the house until he surrendered. In some circumstances a suspect may be more likely to shoot at the police if he thinks he is the subject of a paramilitary attack, than a peaceful search or arrest.

[10] But two findings of fact the district court made compel us, under the controlling authorities, to conclude that the exigent circumstances exception to the knock and

announce rule applied. The district court found that "the facts support a reasonable belief that Sergeant Steen's team would be met with armed resistance." Steen knew that Deshetres was housed within, and that he had a history of violent offenses and a reputation for violence. Also, the district court found that "the facts support a reasonable belief that plaintiffs received some warning, albeit a brief one, that police were approaching their residence."

[11] Steen's defense does not require him to establish that he was correct in thinking that the police would be met with force or evidence destroyed. All he needs is qualified immunity, which he has if "a reasonable officer could have believed [the forcible entry without announcement and opportunity to comply peaceably] to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996). This shield "protects mistaken judgment." *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1098-99 (9th Cir. 1995). The only question before us is whether a reasonable officer could have believed that forcible entry was necessary to protect the officers against armed resistance and protect against destruction of evidence.

[12] Despite our qualms, and the qualms two other courts and a jury have had, about the attack on Deshetres' house, we do not see how this conclusion can be avoided. The findings of fact of the district court, in the particular circumstances of this case, compel it. Sergeant Steen had reason to believe that Deshetres had

armed himself, was a violent person, knew the police were about to enter, might well resist forcibly, and might well flush his methamphetamine down the toilet. In those factual circumstances, the exigency exception applies. We do not suggest that in every narcotics case there is an exception to the knock and announce requirement because of the prevalence of flush toilets in the United States. In this case, Sergeant Steen could reasonably conclude that in light of Deshetres' past and the likelihood that he had been tipped off to the raid, immediate entry was needed to reduce the risk that the police would be met with violent resistance.

[13] This is not to say that Sergeant Steen's judgment was correct. The jury concluded that failure to wait a reasonable time for someone to answer the door caused plaintiffs' damages. After all, Deshetres was never given a chance to respond peaceably; he might well have done so even if he was a violent armed individual in order to prevent violence from engulfing his girlfriend and the baby, and because of the overwhelming force the police had available. Although armed, Deshetres never fired his gun. A tremendous amount of violence was unleashed by the police as a precautionary measure, yet the main reason for the precaution, to prevent a police officer from being shot, was defeated when a police officer was shot by another officer. On the other hand, it may be that the reason Deshetres did not shoot is that one of the officers shot him first. The question on qualified immunity is not whether Sergeant Steen's judgment was mistaken, only whether a reasonable officer could have made the judgment to enter as these officers did in these particular circumstances. He could have. For that reason, Sergeant

Steen is entitled to qualified immunity as a matter of law, based upon the facts found by the district court.

REVERSED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, Individually and as Guardian ad Litem for Nicole L. Thompson, a Minor; NICOLE LEAH THOMPSON, a Minor; and JOSEPH DESHETRES, Plaintiffs-Appellees, v. LARRY WAYNE MAHRE, et al., Defendant, and MICHAEL STEEN, Defendant-Appellant.	No. 94-16912 D.C. No. CV-88-00874-DLJ ORDER (Filed Jun. 10, 1997)

Before: ALARCÓN KLEINFELD and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Kleinfeld and Hawkins vote to reject the suggestion for rehearing en banc. Judge Alarcón so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, individually and as Guardian ad Litem for Nicole L. Thompson, a minor, and JOSEPH DESHETRES, Plaintiffs-Appellees, v. LARRY WAYNE MAHRE, Defendant, and MICHAEL STEEN, Defendant-Appellant.	No. 91-15055 D.C. No. CV-88-874-DLJ **MEMORANDUM*** (Filed April 2, 1992)

Appeal from the United States District Court for the Northern District of California D. Lowell Jensen, District Judge, Presiding Argued and Submitted February 13, 1992
San Francisco, California

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

This appeal arises out of a rather complex 42 U.S.C. § 1983 action involving forcible entry of a residence used as a motorcycle gang clubhouse. At issue here is solely

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

the question whether the district court erred in denying defendant Sergeant Steen's motion for summary judgment based upon qualified immunity. We have jurisdiction of an appeal from an interlocutory order for such review. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Steen is entitled to qualified immunity if his decision to dispense with knock-notice was "objectively legally reasonable" in light of clearly established law. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987).

Before the district court considered Steen's motion for summary judgment, it held an evidentiary hearing to determine, inter alia, whether the forcible entry, instigated by Sergeant Steen, violated the fourth amendment prohibition against unreasonable searches and seizures. *Ker v. State of California,* 374 U.S. 23 (1963) (fourth amendment, as applied to the states through the fourteenth amendment, protects against unannounced police entry absent exigent circumstances). In its order of February 9, 1990, the district court found, and it is not here disputed, that the offices after announcing their arrival waited only seven to ten seconds before beginning their forcible entry with a battering ram. The district court concluded that this was not in compliance with the knock-notice requirement because the police did not wait a sufficient amount of time after announcing their presence before beginning their forcible entry.

Steen maintains in this appeal that he is entitled to qualified immunity because he objectively reasonably believed that immediate entry was justified by exigent circumstances. The claimed exigency was a warning, presumably received by occupants of the house, given by a

pick-up driver who witnessed the arrival of the police and retreated back toward the residence.

Exigent circumstances are those "that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons." *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989) (quotation omitted). Exigent circumstances also exist where an officer has probable cause to believe that evidence is being destroyed, *see United States v. Moreno*, 701 F.2d 815, 818 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 913 (1984), or that occupants are armed and intend to resist violently, *see United States v. Scott*, 520 F.2d 697, 700-01 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056. The district court carefully examined whether the facts of this case, as perceived by Sargent [sic] Steen, presented any one of these recognized exigencies.

The district court found that no exigent circumstance excused Sergeant Steen's failure to comply with the knock-notice requirement. There was no objective basis for the police to believe that many people were inside the house preparing to give armed resistance, nor was there any indication that evidence was being destroyed or that occupants were attempting to escape. The police were positioned to act, however, had any one of these exigencies developed.

In the absence of any clearly established basis for exigency, the district court focused on Steen's belief that there had been a warning to the occupants of police presence. The court considered whether the warning, without independent evidence of armed resistance or evidence destruction, created exigent circumstances. The

court found that the warning was so close in time to the officer's announcement at the front door, that the warning coupled with the few seconds the police waited after their announcement would have given the plaintiffs no more time to respond to the officer's arrival, than the plaintiffs would have had if the officers had complied with the knock-notice requirement. Therefore, it was not objectively reasonable for Sergeant Steen to believe that the presumed warning from the pick-up driver, in the absence of any other perceived risk of violence or destruction of evidence, created any sort of exigency. As the district court explained:

> [T]he specific facts that support Steen's reasonable belief that plaintiffs' residence would be occupied by Deshetres when defendants executed the warrant, that Deshetres might react with armed resistance, and that Deshetres was given some warning of the police's approach, does not excuse his failure to comply with the knock-notice rule. These facts do not raise the presumption that officers' safety was endangered to the point necessary for this court to find that exigent circumstances existed. Likewise, defendants have not demonstrated exigent circumstances based on the possibility that plaintiffs would destroy evidence.

Based upon the district court's factual findings, which are not clearly erroneous, that conclusion is sound.

The district court did engage in the kind of fact-specific analysis required by *Anderson v. Creighton*, 483 U.S. 635, 641 in assessing whether Sargent [sic] Steen's conduct was objectively reasonable. Appellant has not set forth any legal or factual basis to undermine the district

court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity. Accordingly, we affirm. The result of our affirmance on this interlocutory appeal of the district court's denial of a summary judgment motion based upon qualified immunity issue is to return the qualified immunity issue to the district court for determination on its merits. We express no view on those merits here, nor do we resolve whether the course of future proceedings is limited by an understandings [sic] reached by the parties, by any waiver arising form the parties' conduct in prior proceedings, or by any prior ruling of the district court which may obviate the need for further evidentiary proceedings.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, individually and as Guardian ad Litem for Nicole L. Thompson, a minor, and JOSEPH DESHETRES, Plaintiffs-Appellees, v. LARRY WAYNE MAHRE, Defendant, and MICHAEL STEEN, Defendant-Appellant.	No. 91-15055 D.C. No. CV-88-874-DLJ (Northern California) ORDER (Filed Jun. 3, 1992)

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 2, 1992

Mr. Rene Auguste Chouteau
100 Santa Rosa Avenue
P.O. Box 1678
Santa Rosa, CA 95402

Re: Michael Steen
v. Jeri Lynn Thompson, individually and as Guardian ad Litem for Nicole L. Thompson, a minor, and Joseph Deshetres
No. 92-209

Dear Mr. Chouteau:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice White would grant certiorari.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH DESHETRES,
Plaintiff,
v.
LARRY WAYNE MAHRE et al.,
Defendants.

C-88-0875-DLJ

ORDER

(Filed Jul. 7, 1989)

On March 1, 1989, this Court heard cross-motions for summary judgment plaintiff's cause of action under 42 U.S.C. section 1983. Plaintiff's pendant state law claims were not before the Court on summary judgment. Andrew Unetic and John Scott appeared for Plaintiff. Rene Chouteau appeared for Defendants.

For the following reasons, this Court (1) DENIES plaintiff's motion for partial summary judgment, against the individual police officers, on the issue of probable cause to support the search warrant, compliance with the knock-notice entry requirement, and the validity of the nighttime service endorsement on the search warrant; (2) DENIES plaintiff's motion for partial summary judgment, against the City of Santa Rosa and the Santa Rosa Chief of Police, on the issue of municipal and supervisory liability; (3) DENIES defendants' motion for partial summary judgment on the issue of probable cause supporting the search warrant and compliance with the knock-notice entry requirement; and (4) GRANTS defendants' motion for partial summary judgment on the issue of the validity

of the nighttime service endorsement on the search warrant.

I. FACTUAL BACKGROUND

In March 1987, Sergeant Knobelauch, of the Santa Rosa Police Department, received a phone call from Christina Hoisington's father, who expressed concern that his daughter was using and selling drugs. Sergeant Knobelauch assigned Detective Mahre to contact Christina Hoisington.

Detective Mahre went to her house and attempted to buy methamphetamines. Hoisington agreed and asked Mahre to drive her to a house on Lagner Road where she could obtain the drug from a woman named Sue Bond. As they drove to Lagner Road, they were followed buy [sic] a blue pickup truck containing Gary Denno and Tanya Ell, two of Hoisington's acquaintances who also wanted to buy some methamphetamines. Sergeant Knobelauch and Detective Camara provided surveillance.

At Lagner Road, Hoisington talked with Bond and then told Mahre that Bond was going to obtain the methamphetamine from Misfit Joe's house. Mahre recognized this name as the nickname of plaintiff Joseph Deshetres, a member of the Misfits Outlaw Motorcycle Gang.

Bond then drove in the blue pickup truck driven by Denno to plaintiff's residence at 3365 Moorland Avenue. Mahre and Hoisington, as well as the surveillance officers, followed the pickup. At Moorland Avenue, Denno parked in the driveway and Bond walked toward the

back of the house. The residence at 3365 Moorland Avenue is isolated and no other residences are immediately adjacent.

A short time later, Bond returned from around back of the house and got back in the pickup truck. Hoisington told Mahre to drive to the market on the corner and wait for the drugs. Detective Camara meanwhile followed the pickup to the Gold Penny Motel where Sue Bond got out. The pickup returned to the corner market. Gary Denno delivered a package of methamphetamine to Hoisington, who in turn gave it to Mahre. Hoisington then got in the pickup with Denno and Ell. The three were subsequently stopped and arrested.

During these events, Detective Mahre carried a transmitter on his person. This transmitter recorded a frank discussion between Mahre, Knobelauch, and Camara, during which they expressed doubts as to whether they had sufficient probable cause to obtain a search warrant for plaintiff's house. Specifically, they questioned how they were "going to make the money going in the house or the dope coming out of the house."

To resolve these doubts, Knobelauch contacted Assistant District Attorney Mullins, who advised that they conduct further investigation to tie Misfit Joe to Joe Deshetres and Joe Deshetres to the Misfits Motorcycle Gang. During this investigation, Mahre (1) examined plaintiff's arrest record, which showed a number of arrests for violent offenses and drugs; (2) talked to Deputy Anderson about the discovery of methamphetamines during a search of plaintiff's house over 1½ years ago, but Anderson denies ever making this statement; (3)

talked to Officer McMahon who stated that during a prior search, plaintiff was reaching for a loaded pistol as police entered his bedroom.

After completing this additional investigation, Mahre prepared a search warrant endorsed for night service and a statement of probable cause, which he submitted to Mullins for review. During this review, Mahre told the Assistant District Attorney that the officers never saw Bond actually enter plaintiff's residence. Mullins determined that probable cause existed and instructed Mahre to take the affidavit to the magistrate. On March 17, 1987, at approximately 6:00 a.m., a group of police officers led by SWAT teams executed the warrant.

While approaching plaintiff's residence to execute the search warrant, officers observed a white pickup pull partially out in the roadway and then back into the driveway. The vehicle then pulled out again into the roadway and, upon observing several approaching police vehicles, again backed into the driveway. The driver exited the vehicle and moved rapidly towards the rear of plaintiff's house.

Plaintiff, his girlfriend, and her baby, were sleeping in the house. They effected entry by breaking in with a battering ram.

Following plaintiff's arrest and arraignment, the Sonoma County Municipal Court held an eight-day hearing on a motion to suppress pursuant to California Penal Code section 1538.5. On September 30, 1987, the court dismissed the charges pending against plaintiff and suppressed all evidence obtained pursuant to the search warrant. The court held that the search warrant was not

supported by probable cause and the search therefore violated plaintiff's Fourth Amendment rights. The court found that the affidavit contained representations intended to mislead the magistrate, that such misrepresentations were made with reckless disregard for the truth, and that no good faith existed on Mahre's part to warrant excusing the misrepresentations.

The Court further found that the manner of entry into plaintiff's home violated the Fourth Amendment because the officers did not give plaintiff an opportunity to voluntarily surrender and used excessive force to effect the entry. The court determined that no exigent circumstances existed which could reasonably be construed to constitute an emergency and that the officers did not act in good faith in reliance upon any such circumstances.

On October 7, 1987, the prosecution filed a motion in Sonoma County Superior Court to reinstate the complaint against plaintiff pursuant to Penal Code section 871.5. On February 10, 1988, the Judge denied the motion. The court ruled that no probable cause for the search warrant existed.

Plaintiff has filed suit under 42 U.S.C. § 1983 against the Santa Rosa Police Department law enforcement officers responsible for obtaining and executing the search warrant, the City of Santa Rosa and the Santa Rosa Chief of Police, Salvatore Rosano.

II. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

In a motion for summary judgment, the moving party bears the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

However, once the moving party meets its burden, the nonmoving party may no longer rely on allegations in the pleadings to preclude summary judgment. 809 F.2d at 630. Summary judgment may issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the buren [sic] of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

III. LIABILITY OF INDIVIDUAL POLICE OFFICERS

Plaintiff moves for summary judgment on his section 1983 claim, against the seven individual police officers allegedly responsible for obtaining and executing the search warrant, on grounds that the officers: (1) obtained a search warrant not supported by probable cause; (2) executed a search warrant improperly endorsed for nighttime service; and (3) failed to comply with the knock-notice entry requirement.

Defendants move for summary judgment, on the section 1983 claim, on grounds that: (1) the search warrant was supported by probable cause; (2) nighttime service of the search warrant was proper; and (3) there was compliance with the knock notice entry requirement.

A. Probable Cause to Support Search Warrant

1. collateral estoppel

Plaintiff's central argument in support of his motion for summary judgment is based on the doctrine of collateral estoppel. Plaintiff argues that the state court's ruling, that the search warrant was not supported by probable cause, precludes defendants from again relitigating this issue. This Court disagrees.

In a section 1983 action, federal courts are to look to state law in applying the collateral estoppel doctrine. *Allen v. McCurry*, 449 U.S. 90 (1980). Under California law, several requirements must be met in order to assert collateral estoppel. First, there must be a final judgment on the merits. Second, the issues decided in the prior adjudication must be identical to the issues raised in the current action. Third, the party against whom collateral estoppel is asserted must be a party or in privity with a party to the prior action. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 813 (1942). The burden of proof is on the party asserting collateral estoppel. *Haung Tang v. Aetna Life Ins. Co.*, 523 F.2d 411 (9th Cir. 1975).

In *Heath v. Cast*, 813 F.2d 254. 258 (9th Cir. 1987), the Ninth Circuit which held that motions to suppress evidence under section 1538.5 are not considered final judgments

under California law for collateral estoppel purposes. Since the state court's ruling on the motion to suppress is not a final judgment on the merits under *Heath*, plaintiff has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. This Court therefore need not reach the questions of issue identity or privity. This Court notes, however, that the requirement of privity would also prevent the application of collateral estoppel, since the individual police officers who were connected with the narcotics investigation, and obtaining the search warrant, were neither parties to nor directly represented in plaintiff's criminal prosecution.

2. de novo review

Plaintiff alternatively argues that summary judgment, on the section 1983 claim against the individual officers is proper because a *de novo* review by the Court will establish that the search warrant was not supported by probable cause. This Court disagrees.

a. qualified immunity

Even if the officers lacked probable cause to obtain the search warrant, plaintiff would not be entitled to summary judgment against the officers if a genuine issue of fact as to their good faith in obtaining the search warrant exists. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). This Court concludes that the actions of Sergeant Knobelauch and Detective Mahre and Camara in taking their case to the Assistant District Attorney for his opinion regarding the existence of probable cause for issuance

of the warrant and in conducting a further investigation before approaching the magistrate, creates such an issue.

In *Harlow*, the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The question of qualified immunity is one of reasonableness – would a reasonable person in the shoes of the officers have known he was violating the constitutional rights of another? *Id.* Since this determination turns on the reasonableness of the officers conduct in obtaining the search warrant, a genuine issue of material fact remains for trial. *See Celotex*, 106 S. Ct. at 2553; Fed. R. Civ. Proc. 56(c).

Accordingly, plaintiff's motion for summary judgment on the issue of probable cause to support the search warrant is DENIED. Defendants' motion is also DENIED.

B. Compliance with Knock-Notice Entry Requirement

Plaintiff argues he is entitled to summary on the section 1983 claim, against the police officers who executed the search warrant, on grounds that they failed to comply with the knock-notice entry requirement. This Court disagrees for two reasons.

1. personal participation

Section 1983 only imposes liability for "conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution

and laws." *Rizzo v. Goode,* 96 S. Ct. 598, 604 (1976) (citing 42 U.S.C. § 1983). Plaintiff's argument for summary judgment fails to appreciate that the language of section 1983 demands a degree of personal involvement connecting a defendant to the claimed deprivation of a constitutional right. The doctrine of respondeat superior has no application under this section. *Monell v. N.Y. City Dept. of Social Services,* 98 S. Ct. 2018 (1978).

Although plaintiff correctly points out that knock-notice is a fundamental Fourth Amendment right recognized by the Supreme Court, the Ninth Circuit and the California Supreme Court, *Ker v. California,* 835 S. Ct. 1623 (1963), *United States v. Bustamante-Gamez,* 488 F.2d 4 (9th Cir. 1973), *Duke v. Superior Court,* 1 Cal 3d 314 (1959), plaintiff has failed to produce any evidence showing that each individual police officer acted with the purpose of violating his constitutionally protected right. Absent an evidentiary showing linking each police officer, in terms of their state of mind and conduct to the alleged constitutional violation, plaintiff's motion for summary judgment on the knock-notice issue must fail.

2. noncompliance excused

In *Ker,* the Supreme Court made clear that exigent circumstance would authorize noncompliance with the California knock-notice statute.[1] The record in this case

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[1] The knock-notice requirement under California law is set forth in section 1531 of the Penal Code. That section provides:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein,

clearly presents a disputed issue of fact as to whether, in light of the particular circumstances surrounding the execution of the search warrant, the officers were justified for failing to give proper notice. Specifically, the evidence shows that the officers had reason to believe that the driver of the white pickup had prematurely disclosed their presence to plaintiff. In addition, the evidence shows that the officers had reason to believe that plaintiff, and other members of the Misfit Motorcycle Gang thought to be occupying the house, had a propensity for violence. Although the officers did effect entry with a battering ram, a genuine issue of material fact exists as to whether exigent circumstances justifying such an entry were present.

For these reasons, this Court DENIES both plaintiff's and defendants' motion for summary judgment on the knock-notice issue.

C. Nighttime Service of the Search Warrant

Both plaintiff and defendants argue they are entitled to summary judgment on the issue of whether the affidavit demonstrated reasonable cause for issuance of a nighttime service endorsement on the search warrant.

Under California Penal Code section 1533, a magistrate may upon a showing of good cause authorize nighttime service of a search warrant. As amended in 1986,

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to execute the warrant, if, after notice of his authority and purpose he is refused admittance."

Cal. Pen. Code § 1531.

section 1533 permits consideration of the safety of police officers serving the warrant and the safety of the public as factors establishing good cause for night service. The court in *People v. Kimble*, 44 Cal. 3d 480, 495 (1988) also recognized police officer and public safety as a basis for night service.

Defendants argue that summary judgment is proper because the statement of probable cause demonstrated good cause for issuance of a nighttime service endorsement on the warrant. Specifically, defendants point to plaintiff's propensity for violence as well as the fact that service at dawn heightens the chances that individuals in the residence would be asleep and less likely to obtain weapons. In addition, defendants point out that, in the early morning hours, vehicle and pedestrian traffic in plaintiff's neighborhood is limited.

Although defendants have come forward with evidence demonstrating that the night search was designed to minimize the risk of physical harm to police officers and passerbys, plaintiff has failed to meet his burden under *Celotex* by placing in dispute defendants' evidence of good cause for nighttime service. 106 S. Ct. 2548, 2552-53 Accordingly, this Court GRANTS defendants' motion for summary judgment on the issue of nighttime service.

IV. MUNICIPAL LIABILITY

Plaintiff has filed a supplemental brief in which he moves for summary judgment on his section 1983 municipal liability claim against the City and supervisory liability

claim against the Chief of Police, Salvatore Rosana. No cross-motion for summary judgment has been filed.

A. Liability of City Santa Rosa [sic]

Plaintiff argues that he is entitled to summary judgment, on his section 1983 claim against the City of Santa Rosa, under *Pembauer v. Cincinnati*, 106 S. Ct. 1292 (1986). Specifically, plaintiff contends that liability should be imposed on the City for the decision of officers Mahre, Knobelauch, and Camara, in obtaining a search warrant not supported by probable cause. Plaintiff alleges that Chief Rosano, in his deposition, testified that these officers were the officials responsible for establishing final policy with respect to obtaining the search warrant.

Although plaintiff is correct that municipal liability may be imposed under *Pembauer* for a single decision by municipal policy makers, plaintiff fails to appreciate that municipal liability attaches only under *Pembauer* where the decision maker possess [sic] final authority to establish final policy with respect to the action ordered. *Id.* at 1299.[2]

This Court holds that plaintiff has failed to establish that officers Mahre, Knobelauch, and Camara, possess the final policymaking authority contemplated by *Pembauer*. Contrary to plaintiff's contention, Chief Rosano's deposition testimony, that "we don't restrict any officer from presenting an affidavit," does not establish that the officers had final policymaking authority. That the officers

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[2] "Policy" generally implies a course of action chosen from among various alternatives. *Id.* at 1300

meet with the Assistant District Attorney for guidance on obtaining the search warrant further supports this Court's conclusion that they lacked the type of final decision making authority required by *Pembauer*. Plaintiff's motion for summary judgment on the section 1983 claim against the City is therefore DENIED.

B. Liability of Chief of Police

Plaintiff argues that he is entitled to summary judgment on his section 1983 claim against the Chief of Police based on his alleged failure to investigate the incident at issue and discipline the responsible officers. As support, plaintiff relies on *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986), where the court held that a policy or custom may be inferred if no steps are taken to reprimand or discharge.

This Court finds plaintiff's argument for supervisory liability under *McRorie* unconvincing. In his deposition, Chief Rosano testified that he did impose discipline where he thought that discipline was due. Although he did not punish the officers for every alleged infraction, he did punish them for taking pictures on plaintiff's motorcycle after the search. Genuine issues of material fact remain unresolved with respect to the Chief's conduct. *See Celotex*, 106 S. Ct. at 2553; Fed. R. Civ. Proc. 56(c).

Accordingly, plaintiff's motion for summary judgment on the section 1983 claim against the Chief of Police is DENIED.

V. CONCLUSION

For all of the foregoing reasons, this Court (1) DENIES plaintiff's motion for partial summary judgment on the issue of probable cause to support the search warrant, compliance with the knock-notice entry requirement, and the validity of the nighttime service endorsement on the search warrant; (2) DENIES plaintiff's motion for partial summary judgment, against the City of Santa Rosa and the Santa Rosa Chief of Police, on the issue of municipal and supervisory; (3) DENIES defendants' motion for partial summary judgment on the issue of probable cause supporting the search warrant; and (4) GRANTS defendants' motion for partial summary judgment on the issue of the validity of the nighttime service endorsement on the search warrant.

IT IS SO ORDERED:

DATED: July 7, 1989.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERI L. THOMPSON, individually and as Guardian ad Litem for NICOLE L. THOMPSON, a minor, Plaintiffs, v. LARRY WAYNE MAHRE, et al., Defendants.	C-88-0874-DLJ C-88-0875-DLJ **ORDER**
JOSEPH DESHETRES, Plaintiff, v. LARRY W. MAHRE, et al., Defendants.	(Filed Feb. 9, 1990)

This Court conducted an evidentiary hearing concluding on December 15, 1989, in the above captioned civil rights actions. The hearing presented two issues for decision: (1) whether the police officers of the City of Santa Rosa had probable cause to support the search warrant used to enter plaintiffs' residence, and (2) whether defendants complied with the knock-notice entry requirement in serving the warrant. The parties introduced oral and documentary evidence to support their respective positions, and then argued and submitted these issues for decision. Andrew Unetic and John Houston Scott appeared for plaintiff Joseph Deshetres. Leroy Lounibos, Jr. appeared for plaintiff Jeri Lynn

Thompson. Rene Chouteau appeared for defendants. For the following reasons, the Court holds that defendants had probable cause to support the search warrant, but that they failed to comply with the knock-notice entry requirement.

I. FACTUAL BACKGROUND

Plaintiffs brought these actions under 42 U.S.C. § 1983 against certain Santa Rosa police officers who in March 1987 allegedly made various misrepresentations to obtain a search warrant for plaintiffs' residence, and then illegally executed the warrant.

The undisputed facts in this case are as follows:

Santa Rosa police officers Larry Mahre, Kent Knobelauch and James Camara were conducting an investigation into and surveillance relating to the sale of methamphetamine in March 1987. The investigation began when Sergeant Knobelauch received a phone call from a man stating that his daughter was using and selling drugs. Acting in an undercover capacity, Detective Mahre subsequently contacted the daughter, Christina Hoisington, and attempted to buy methamphetamine from her. Hoisington agreed to arrange a drug purchase, and told Mahre it would be accomplished through a woman named Sue Bond. Hoisington and Mahre thereafter drove in Mahre's car to Bond's residence on Lagner Road, accompanied by a blue pickup truck driven by an acquaintance of Hoisington's, Gary Denno, who also sought to purchase methamphetamine. Sergeant Knobelauch and Detective Camara provided surveillance.

Following a discussion at Bond's residence, Hoisington and Bond informed Mahre that they had decided to obtain the methamphetamine from the residence of "Misfit Joe." Mahre recognized this name as the nickname of plaintiff Joseph Deshetres, a member of a local motorcycle gang called the Misfits. The group then proceeded to Deshetres' residence at 3365 Moorland Avenue as follows: Bond rode with Denno in the lead vehicle, a blue pickup, Detective Mahre and Hoisington followed in his car, and Sergeant Knobelauch and Detective Camara trailed the group in separate unmarked police cars.

The blue pickup stopped in the front yard area upon arriving at plaintiffs' residence. The officers then observed Bond leave the truck and walk towards the back of plaintiffs' residence, out of view of the surveillance team. Meanwhile, Hoisington and Detective Mahre drove by the residence and stopped at an area nearby, where Hoisington briefly left the car to make a phone call. Upon her return, she told Mahre that they should leave the scene and wait for the drugs at a nearby grocery store. He complied. Other officers observed Bond return and reenter the pickup truck. The pickup truck, with Detective Camara following, then drove from the residence to Highway 101, and proceeded to the Rohnert Park exit where it left the freeway and pulled into the parking lot of the Golden Penny Motel. During this journey, Detective Camara briefly lost sight of the blue pickup truck on two occasions, once on a freeway overpass and again at the point where the pickup exited the freeway and pulled into the nearby Golden Penny parking lot. After letting Bond out at the motel, Denno drove the pickup truck back to the grocery store to meet Mahre. In the parking

lot of the grocery store, Detective Mahre observed Denno give a package to Hoisington, who in turn gave it to Mahre. The package contained methamphetamine.

During these events, Detective Mahre had hidden on his person a transmitter to enable his conversations with Hoisington to be monitored and recorded by other officers. After Detective Mahre and Christina Hoisington had parted, the officers met and discussed the transaction that had just taken place. During this discussion the transmitter was inadvertently left on and recorded a frank discussion between officers Camara, Knobelauch, and Mahre, wherein they questioned whether sufficient probable cause existed for a search warrant of plaintiffs' residence. Specifically, they wondered how they were "going to make the money going in the house or the dope coming out of the house." To resolve these doubts, Sergeant Knobelauch consulted Sonoma County Assistant District Attorney Michael Mullins, who advised them to conduct further investigation of the connection between Joseph Deshetres and the Misfits motorcycle gang to strengthen their showing of probable cause.

Detective Mahre subsequently (1) examined Deshetres' arrest record, which included prior arrests for violent offenses and drugs; (2) learned from another police agency that officers had discovered methamphetamine during a previous search of plaintiffs' residence, although the source of this information has subsequently stated he does not recall providing Mahre with such information; and (3) learned that during another police search of plaintiffs' residence Deshetres had reached for a loaded pistol.

Detective Mahre then prepared and submitted to Assistant District Attorney Michael Mullins a proposed search warrant and attached statement of probable cause setting forth the circumstances of the sale and incorporating the additional information. Mahre's statement of probable cause represented that while under police surveillance Sue Bond had "responded to the house" at 3365 Moorland Avenue. Mahre further represented that Bond was under "constant surveillance" while traveling from the Moorland Avenue residence to the Golden Penny Motel and back to the grocery store where Mahre ultimately received the drugs. Mullins reviewed the materials, approved the proposed warrant and statement of probable cause, and instructed Mahre to seek a warrant from a magistrate. The warrant was issued by the magistrate on March 16, 1987.

In the early morning hours of March 17, 1987, a SWAT team and a group of officers led by Sergeant Michael Steen executed the search warrant at plaintiffs' residence. While approaching 3365 Moorland Avenue, the officers observed a white pickup truck pulling out of plaintiffs' driveway. The officers further recognized the driver of the pickup as a member of the Misfits gang. Apparently spotting the police vehicles, the driver pulled back into plaintiffs' driveway, exited the truck and walked to the rear of the residence.

The police quickly surrounded the house. Sergeant Steen instructed the officers at the front door to make a forcible entry. At the time he gave this order, Officer Edwin Hemphill had already knocked on the door and announced their presence. Some seven to ten second [sic] had passed with no response heard from the occupants of

the house. At Steen's direction, the officers used a battering ram to break down the door and then entered the house. At the time Joseph Deshetres was in the bedroom with his girlfriend, Jeri Lynn Thompson, and her infant daughter Nicole.

Following plaintiff Deshetres' arrest, the Sonoma County Municipal Court suppressed all evidence provided by the warrant under California Penal Code § 1538.5 and dismissed the charges pending against Deshetres. The court found that the warrant was not supported by probable cause and that Mahre's affidavit contained representations intended to mislead the magistrate. The Court further found that the manner of entry into the residence also violated the Fourth Amendment because the officers used excessive force and did not give Deshetres an opportunity to voluntarily surrender. The court determined that no exigent circumstances existed on the morning of March 17, 1987, which could reasonably be construed to constitute an emergency.

Plaintiffs brought the present civil rights actions in federal court on March 10, 1989. The Court subsequently ruled on July 7, 1989, that genuine issues of material fact existed both as to the probable cause for the search warrant in this case and as to defendants' compliance with the knock-notice requirement during service of the warrant. The evidentiary hearing on these legal issues followed.

II. FINDINGS OF FACT

Having considered the evidence presented by counsel and heard their arguments regarding (1) the existence

of probable cause to support the warrant and (2) defendants' compliance with the knock-notice entry requirement, the Court makes the following findings of fact. These factual findings supplement the undisputed facts recounted above.

1. Detective Mahre, who is an experienced narcotics officer in the Santa Rosa police department, harbored no intent to mislead either Assistant District Attorney Mullins or the magistrate when he used the term "responded to" to describe Sue Bond's approach of the plaintiffs' residence, as observed by the Santa Rosa police's surveillance team.

2. Detective Mahre harbored no intent to mislead either Assistant District Attorney Mullins or the magistrate when he represented in his affidavit that the blue pickup truck was under "constant surveillance" while it traveled from plaintiffs' residence to the Golden Penny Motel. However, Detective Mahre acted with reckless disregard of the truth in using this term to describe the police surveillance.

3. Detective Mahre orally informed Assistant District Attorney Mullins that the surveillance team did not actually observe Bond enter plaintiffs' residence.

4. Detective Mahre also informed Assistant District Attorney Mullins that the surveillance team briefly lost sight of the blue pickup truck and its occupants on two occasions while the pickup traveled from plaintiffs' residence to the Golden Penny Motel, before rejoining Detective Mahre in the grocery store parking lot.

5. Although these lapses in surveillance provided an opportunity for the occupants of the pickup, Sue Bond and Gary Denno, to obtain methamphetamine from some source other than plaintiffs' residence, the possibility that such a quick drug transaction occurred undetected by the surveillance team is remote.

6. The totality of circumstances presented to the magistrate in Detective Mahre's affidavit establish a fair probability that a search warrant would uncover evidence of possession of methamphetamine for sale at plaintiffs' residence at 3365 Moorland Avenue.

7. Detective Mahre consulted in good faith with Assistant District Attorney Mullins regarding the legal sufficiency of Mahre's affidavit of probable cause.

8. The arrival of the Santa Rosa police at plaintiffs' residence to serve the search warrant was compromised by the driver of the white pickup truck, because that person had an opportunity to prematurely disclose the police approach to the residence.

9. The Santa Rosa police forcibly entered plaintiffs' residence only a short time – seven to ten seconds – after announcing their presence, based on Sergeant Steen's conclusion that such entry was necessary to provide officer safety and to prevent the destruction of evidence.

III. DISCUSSION

To state a claim under 42 U.S.C. § 1983 a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United

States, and (2) that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 108 S. Ct. 2250, 2255 (1988). Section 1983 does not impose liability for violations of duties of care arising out of state tort law, *Baker v. McCollan*, 443 U.S. 137, 146 (1979), or for a state official's negligent acts that cause unintended loss of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). In addition, liability may be imposed on an individual defendant only where the plaintiff can establish that the defendant proximately caused the deprivation of his constitutional rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

In this case plaintiffs contend that defendants' unlawful entry into their residence violated their Fourth Amendment rights. As plaintiffs in a civil action, they bear the burden of proving by a preponderance of the evidence that such a violation occurred.

A. Probable Cause to Support the Search Warrant

Plaintiffs contend that the warrant obtained by defendants to search plaintiffs' residence lacked probable cause. This Court's analysis of probable cause is guided by the totality of circumstances approach adopted by the Supreme Court in *Illinois v. Gates*, 103 S. Ct. 2317 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id., 103 S. Ct. at 2322. This Court must pay great deference to a magistrate's determination of probable cause and need only "ensure that the magistrate had 'a substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

In weighing the evidence supporting a request for a search warrant, the magistrate may rely on the conclusions of experienced law enforcement officers regarding where evidence of crime is likely to be found. *United States v. Fannin*, 817 F.2d 1379, 1380-81 (9th Cir. 1987). Direct evidence that contraband or evidence is located at a particular location is not essential to establish probable cause to search the location. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986). Instead the issuing magistrate's decision should be a practical one, based in common sense. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876 (1986).

Where a challenge is made to the validity of a warrant affidavit, this Court must consider two factors to determine if a violation of Fourth Amendment rights occurred: (1) whether the alleged misstatements in the affidavit were made either intentionally or in reckless disregard for the truth, and if so, (2) whether, after deleting the misstatements or adding the omissions, the affidavit is insufficient to establish probable cause. *Franks v. Delaware*, 98 S. Ct. 2674, 2676-77 (1978). *See also United States v. Davis*, 714 F.2d 896, 899 n.5 (9th Cir. 1983).

The theory underlying plaintiffs' probable cause argument is that defendants acted in bad faith in obtaining the search warrant in this case because of their

excessive zeal in pursuing the Misfit motorcycle gang and its members. Plaintiffs allege that defendants used a small, isolated drug transaction that may have emanated from plaintiffs' residence as a pretext to mount an offensive against what they wrongly perceived to be the Misfit gang clubhouse. Plaintiffs specifically allege that Detective Mahre, under the supervision of Sergeant Knobelauch, withheld information and otherwise misled the Assistant District Attorney and the Magistrate in order to obtain a search warrant that lacked probable cause.

The crux of plaintiffs' contentions lies in two asserted misrepresentations from Mahre's affidavit supporting the search warrant.

First, Mahre stated that while under police surveillance, a white female later identified as Sue Bond exited the blue pickup truck and "responded to the residence at 3365 Moorland Avenue." Plaintiffs argue that this statement improperly suggests that Bond was seen entering plaintiffs' residence. In fact, the police observed Bond merely approaching the back of plaintiffs' residence after having parked in their driveway. It is thus possible that Bond never entered plaintiffs' residence, even though the house is isolated from other homes to the rear and on either side on Moorland Avenue. Plaintiffs further argue that defendants' motive in disguising the true facts is revealed in their tape-recorded discussion, which makes clear that the officers understood that their failure to observe "the money going in the house or the dope coming out of the house" was problematic.

The Court is of the opinion that Mahre's use of the term "responded to" to describe Bond's approach of plaintiffs' residence in his affidavit was not made intentionally or in reckless disregard of the truth. The term appears throughout his affidavit, in a variety of contexts. For example, Mahre states that he "responded back" (i.e. physically returned) to the Santa Rosa police department after his initial meeting with Christina Hoisington, and that she later informed him that they were "responding over" (i.e. proceeding) to the residence at 3365 Moorland Avenue. Moreover, whether the drug transaction occurred inside or outside plaintiffs' residence is not legally significant so long as it occurred somewhere on the premises. If a drug transaction takes place in one portion of a premises, the entire premises may be searched for evidence of that drug transaction. *United States v. Roberts*, 747 F.2d 537, 543 (1986). In this case there is no other residence located behind or to the side of plaintiffs' home.

More troubling is the second of Mahre's alleged misrepresentations. In his affidavit Mahre claims that during the entire drug transaction the blue pickup truck driven by Gary Denno and its occupants "were under constant surveillance by members of the Santa Rosa Police Department" and that "at no time was the pickup truck out of view of the surveillance units." This is clearly false. The officer responsible for surveillance of the pickup truck, Detective Camara, states that there were in fact gaps in his surveillance while the pickup traveled from plaintiffs' residence to the Golden Penny Motel. Camara further admits that the pickup was not under his surveillance when it first entered the Golden Penny parking lots and

that it is possible, though highly unlikely, that an exchange of drugs could have occurred there before he resumed visual contact with the pickup and its occupants. Camara communicated this knowledge to Mahre before the latter officer prepared his affidavit.

Defendants admit that Detective Mahre was aware of these assertedly minor gaps in surveillance, despite the representations in his affidavit. However, defendants contend that there was no ambiguity in their disclosure of information to Assistant District Attorney Mullins, in light of the fact that Mahre told Mullins of the exact nature of Detective Camara's surveillance. During the evidentiary hearing conducted by this Court, Mullins testified that he approved the warrant application despite knowing of these surveillance gaps because all of the other information presented made it probable that the drug transaction occurred at plaintiffs' residence and unlikely that it occurred elsewhere.

This Court finds that Detective Mahre acted with reckless disregard of the truth in representing to the magistrate that the blue pickup truck was under constant surveillance. However, the Court agrees with the Assistant District Attorney's determination that Detective Mahre's affidavit provided ample facts to support a search warrant of plaintiffs' residence, with or without the representations of constant surveillance. These facts include: (1) Mahre's substantial experience as a narcotics officer; (2) a statement from an unwitting informant, Christina Hoisington, that the source of the methamphetamine was plaintiffs' residence; (3) the observation of Sue Bond while she parked in plaintiffs' driveway and walked towards the back of the residence, which

stands apart from other residences on the street; (4) the circumstances and timing of the gaps in Detective Camara's surveillance of the blue pickup truck, as it traveled from plaintiffs' residence, to the Golden Penny, and finally to the grocery store where Mahre received the methamphetamine from Gary Denno through Christina Hoisington, were such that it is not reasonably probable that a transfer of narcotics occurred anywhere except plaintiffs' residence; and (5) plaintiff Deshetres' arrest record for drug offenses and violent crimes. These facts establish a fair probability that evidence of a crime would be found at plaintiffs' residence.

Accordingly, under the two-prong test enunciated in *Franks v. Delaware*, 98 S. Ct. at 2676-77, this Court upholds the validity of the warrant in question despite finding that Detective Mahre's affidavit omitted relevant facts as to surveillance through the use of false statements. The Court's decision is in accord with *United States v. Kirk*, 781 F.2d 1498 (11th Cir. 1986). In that case two government agents conducting surveillance lost sight of the suspects for an unstated but substantial period after the suspects entered a hotel, and again in a restaurant. The Eleventh Circuit upheld the search warrant despite the lapses in surveillance, finding that other possible sources of the drugs in question did not eliminate the substantial basis for probable cause that the drugs might be found in a residence targeted by the search warrant. *Id.*, 781 F.2d at 1505-06.

In sum, this Court holds that based on the totality of circumstances, plaintiffs have not carried their burden of establishing that the search warrant obtained by defendants was not supported by probable cause.

However, even if plaintiffs had satisfied their burden regarding probable cause, the Court is of the opinion that the officers who obtained the search warrant are protected from liability under the qualified immunity doctrine.

The individual police officer defendants in this case are entitled to qualified immunity if their search did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald,* 102 S. Ct. 2727, 2738 (1982). The test is one of objective reasonableness. *Malley v. Briggs,* 106 S. Ct. 1092, 1097-98 (1986). Officers exercising reasonable competence in obtaining a search warrant thus cannot be held liable for the violation of constitutional rights. *Forster v. County of Santa Barbara,* 90 C.D.O.S. 845 (9th Cir. February 7, 1990). Individual officers can buttress their claim of objectively reasonable conduct by consulting a district attorney before submitting the warrant to a magistrate. *Ortiz v. Van Auken,* 887 F.2d 1366, 1370-71 (9th Cir. 1989). Courts will generally not require officers to "second-guess the legal assessments of trained lawyers." *Arnsberg v. United States,* 757 F.2d 971, 981 (9th Cir. 1985), *cert. denied,* 475 U.S. 1010 (1986).

In this case the officers' conduct was objectively reasonable. Not only did they amass and present substantial information linking plaintiffs to the drug transaction in question, but Detective Mahre also prudently submitted his affidavit in advance to the Assistant District Attorney. This Court finds that there was no misrepresentation and that there was full disclosure of facts known to police when they submitted the issue of probable cause to the Assistant District Attorney. His approval of the warrant

application effectively immunizes the defendant officers, because district attorneys, and not police officers, are in the best position to evaluate when legal standards such as probable cause are satisfied. The individual officers thus conducted themselves with reasonable competence by following Assistant District Attorney Mullins' instructions to gather additional evidence, and then by acquiescing in his legal determination regarding probable cause.

B. The Knock-Notice Entry Requirement

The second issue presently before the Court is whether or not defendants violated the knock-notice entry requirement when executing the search warrant at plaintiffs' residence. Under California law this requirement is defined by statute:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose he is refused admittance.

Cal. Penal Code § 1531. Knock-notice rights are protected under the Fourth Amendment. *Ker v. California*, 83 S. Ct. 1623 (1963).

The rationale for requiring police officers to identify themselves and their purpose, and be refused admittance, before forcibly entering a residence is not to obtain a consensual entrance, but rather to prevent precipitous action that violates the privacy of and endangers innocent persons who may be present within. *Duke v. Superior Court*, 1 Cal. 3d 314, 321 (1969). The appropriate time interval that an officer must wait, after announcing his or

her presence and hearing no response from within, before breaking down a door is determined according to the exigencies of the particular situation facing the officer. *People v. Peterson*, 9 Cal. 3d 717, 722-24 (1973); *People v. Gallo*, 127 Cal. App. 3d 828, 838-39 (1981). The police's failure to comply with the knock-notice requirement in the absence of exigent circumstances renders the ensuing search unreasonable under the Fourth Amendment. *Duke v. Superior Court*, 1 Cal. 3d at 325; *Ker v. California*, 83 S. Ct. 1623. Exigent circumstances are limited to situations where officers have a reasonable and good faith belief that compliance with the knock-notice rule would increase their danger, frustrate an arrest, or result in the destruction of evidence. *Parsley v. Superior Court*, 9 Cal. 3d 934, 938 (1973).

The Court must resolve two issues in considering defendants' alleged violation of plaintiffs' Fourth Amendment rights in this case: (1) whether or not defendants' waiting period of seven to ten seconds before breaking into plaintiffs' residence was sufficient to comply with the knock-notice requirement; and (2) whether or not defendants' compliance was excused by exigent circumstances. Plaintiffs bear the burden of proof on both issues.

1. Compliance

The legal standard for compliance with the knock-notice requirement is clear. Where the police duly announce their identity and purpose, forcible entry is not permitted until the occupants of the premises are given

an opportunity to first surrender the premises voluntarily. *People v. Neer*, 177 Cal. App. 3d 991, 995-96 (1986).

In this case Sergeant Steen initially intended to comply with the knock-notice rule. Believing that the police's presence had been prematurely disclosed while attempting to serve the warrant, however, Steen ordered entry of plaintiffs' residence based on exigency. The issue before the Court is thus whether or not the seven to ten second waiting period observed by Officer Hemphill and others before acting on Sergeant Steen's new orders represents the functional equivalent of compliance with knock-notice.

In resolving the compliance issue the Court considers the following circumstances. Service of the warrant occurred at 6:00 a.m. Plaintiffs were asleep in a bedroom towards the rear of the house at the time. Although plaintiffs may have heard defendants announce their presence from outside the front door, plaintiffs had no way of confirming who was at the door in the amount of time provided. Under these circumstances, seven to ten seconds was inadequate to imply a refusal by plaintiffs to consent to defendants' search of their residence.

Defendants urge the Court to consider the California Court of Appeal decision in *People v. Hobbs*, 192 Cal. App. 3d 959 (1987). In that case the court reasoned that implied refusal exists where there is an unreasonable delay in responding to the police's announcement, and that the reasonableness of the delay cannot be quantified by measurement of time, but rather depends on all the circumstances of the case. *Id.* at 964. Based on this reasoning, the

court held that a waiting period of only five seconds constituted an implied refusal.

This Court does not disagree with the decision in *Hobbs*. That case, however, presented very different facts from the present one. In *Hobbs*, the officers and the occupant of the house made visual contact through the doorway, and the officers could gauge by her reaction that she was unwilling to let them enter. In contrast, this case presents circumstances which explain a delay in responding to defendants' announcement. Defendants here knew that plaintiffs were likely to be asleep at 6:00 a.m., and they could not see plaintiffs' reaction to their announcement. Moreover, plaintiffs could not know for sure that it was the police who sought to enter. Defendants thus placed plaintiffs in the exact situation that the knock-notice rule was designed to prevent: one where an occupant might respond violently to a break-in of his house by unknown persons. *Accord, People v. Abdon*, 30 Cal. App. 3d 972 (1972) (waiting period of five to six seconds not sufficient to imply refusal where occupant was asleep at time of police announcement); *People v. Gonzalez*, 211 Cal. App. 3d 1043 (1989) (no implied refusal where police served warrant at 12:50 a.m. and waited only five seconds, despite knowing that occupant could not see them).

The Court therefore finds that, based on the circumstances of this case, defendants' decision to enter plaintiffs' residence after waiting only seven to ten seconds did not serve as the functional equivalent of compliance with knock-notice. Given this finding, plaintiffs have established a violation of their Fourth Amendment rights implicated by the knock-notice requirement unless defendants' compliance was excused by exigent circumstances.

2. Exigent Circumstances

Defendants argue that the facts of this case do indeed give rise to exigent circumstances, in large part because their presence at plaintiffs' residence the morning of March 17, 1987 was prematurely disclosed by the driver of the white pickup truck. This premature disclosure, defendants contend, endangered the safety of the police officers in attempting to serve the search warrant and therefore excused compliance with Penal Code section 1531.

It is true that police officers are not required to comply with the knock-notice requirements when there are reasonable grounds to believe that compliance would endanger the officers. *People v. Bennetto*, 10 Cal. 3d 695, 700 (1974). However, such a belief "must be based on specific facts and not on broad, unsupported presumptions." *People v. Dumas*, 9 Cal. 3d 871, 878-89 (1973).

In this case Sergeant Steen had knowledge of the following specific facts at the time he served the warrant at plaintiffs' residence: (1) plaintiff Deshetres had an arrest record dating back fifteen years for various weapon and drug charges, but the most recent arrest, for armed robbery, was five years old; (2) nine years previous to the service of the warrant Deshetres had been arrested by the Santa Rosa police department while reaching for a handgun; (3) Deshetres was a member of the Misfit motorcycle gang, which had a reputation for drugs and violence; (4) several vehicles had been parked alongside plaintiffs' residence a day or two before the service of the warrant, from which Sergeant Steen inferred that there might be as many as ten occupants of the house; (5) a

single drug transaction involving methamphetamine was believe [sic] to have occurred at plaintiffs' residence earlier in the week; and (6) the police's presence at plaintiffs' residence was prematurely disclosed by the driver of the white pickup truck, who saw them approaching.

The issue before the Court is whether or not these specific facts support a reasonable belief that compliance with the knock-notice requirement would endanger the safety of the officers. Defendants contend that, based on these specific facts, Sergeant Steen and the men under his command expected substantial armed resistance from the occupants of plaintiffs' residence, and that this expectation was reasonable. This Court's careful analysis of these specific facts reveals that they support three key presumptions.

First, the facts support a reasonable belief that Deshetres would be inside the house when defendants served the search warrant on the morning of March 17, 1987. Sergeant Steen knew that Deshetres lived at 3365 Moorland Avenue and could reasonably expect that he would be sleeping in his own house at 6:00 a.m. Steen's expectation of finding as many as ten members of the Misfit motorcycle gang occupying the premises, however, was not reasonable. The only basis of this belief was his knowledge that Deshetres belonged to a motorcycle gang and that several cars had been parked alongside plaintiffs' residence one or two days before defendants served the warrant. The evidence does not establish that several vehicles were parked at the residence site at the time of this incident. Although Steen may have believed that 3365 Moorland Avenue was the clubhouse of a motorcycle gang with a penchant for violence, and that this

clubhouse would be occupied by as many as ten gang members, such belief was not based on specific facts or otherwise reliable information and therefore was not reasonable.

Second, the facts support a reasonable belief that Sergeant Steen's team would be met with armed resistance. Steen knew that Deshetres was housed within, and that he had a history of weapons offenses and a reputation for violence. On the other hand, Steen had no reliable evidence that other occupants would help Deshetres in resisting the police, or that Deshetres would be prepared to resist given the early morning time of the police's entry.

Third, the facts support a reasonable belief that plaintiffs received some warning, albeit a brief one, that police were approaching their residence. Sergeant Steen's intent to catch plaintiffs off guard was thus somewhat compromised. The record in this case indicates that although Steen intended to comply with the knock notice requirement, he altered his plans upon seeing that the police's approach was compromised by the driver of the white pickup. The assumed warning by the driver of the white pickup thus provided plaintiffs with approximately the same warning or opportunity to voluntarily surrender the premises as would have been provided by Sergeant Steen's compliance with the knock-notice rule.

In the opinion of the Court, the specific facts that support Steen's reasonable belief that plaintiffs' residence would be occupied by Deshetres when defendants executed the warrant, that Deshetres might react with armed resistance, and that Deshetres was given some warning of

the police's approach, does not excuse his failure to comply with the knock-notice rule. These facts do not raise the presumption that officer safety was endangered to the point necessary for this Court to find that exigent circumstances existed. Likewise, defendants have not demonstrated exigent circumstances based on the possibility that plaintiffs would destroy evidence.

Defendants attempt to liken the circumstances of this case with the facts of *People v. Dumas*, 9 Cal. 3d 871 (1973). In *Dumas*, the police had reliable information that the householder routinely answered the door with a loaded pistol. The California Supreme Court therefore found that the presence of exigent circumstances excused the officers' compliance with knock-notice. In this case, however, Sergeant Steen had no similar evidence regarding Deshetres. Instead, Steen relied on information that on a single past occasion, Deshetres had reached for a gun while in the process of being arrested. Mere knowledge of a single such incident does not provide reasonable grounds for the police to believe that compliance with the knock-notice rule would endanger officer safety. *See People v. Bennetto*, 10 Cal. 3d at 700-01. This is particularly true in this case, where certain officers within the Santa Rosa police department, although not Sergeant Steen, knew that Deshetres had peaceably permitted police entry into the residence at 3365 Moorland Avenue only a year earlier.

Defendants further contend that Deshetres' history of weapons offenses led Sergeant Steen and others to reasonably expect the presence of guns within the residence. The specter of armed resistance does not, however,

excuse compliance with section 1531. As stated by the California Supreme Court,

> one of the primary purposes of section 1531, in addition to the protection of individual privacy, is to prevent possible violent responses that might be aroused in a startled and fearful householder suddenly confronted with unknown persons breaking into his home for unannounced reasons [citation omitted]. The danger that such a confrontation will result in serious injury or death to the occupant, police officers, or innocent bystanders is obviously intensified when the householder is in possession of a firearm. Thus, where the police are aware of such a weapon, the case for requiring them to give notice of their authority and purpose becomes more rather than less compelling.

People v. Dumas, 9 Cal. 3d at 878. Accordingly, the mere knowledge that Deshetres was likely to keep a weapon in his residence provided Sergeant Steen with more and not less reason to comply with the knock-notice rule.

Lastly, defendants contend that the particular circumstances present upon the police's approach of 3365 Moorland Avenue, specifically the warning that plaintiffs may have received from the driver of the pickup truck, significantly increased the threat to officer safety. Defendants' contention, however, ignores the fact that the warning of police presence they assume plaintiffs received in this case is the equivalent of the circumstance of actual warning provided by knock-notice itself. The facts known to the police before arriving at plaintiffs' residence to execute the search warrant do not support exigent entry, and the additional fact of an assumed warning does not of

itself, or in conjunction with the already known facts, justify an otherwise prohibited exigent entry. *Compare, e.g., People v. Tribble*, 4 Cal. 3d 826, 833 (1971) (exigent circumstances arose when serving the warrant where officers observed gun in suspect's car and heard sound of running footsteps as they approached the door).

With respect to exigent circumstances based on destruction of evidence, defendants had no information that plaintiffs had destroyed evidence on other occasions, nor did Sergeant Steen's decision to serve the warrant at daybreak encourage this possibility. Moreover, the rationale underlying the knock-notice rule specifically contemplates the existence of some opportunity for occupants of private residences to destroy evidence.

Accordingly, the Court holds that exigent circumstances did not exist at the time defendants served the search warrant at plaintiffs' residence.

VI. CONCLUSION

For all the foregoing reasons, the Court makes the following pre-trial rulings in these actions:

(1) The warrant underlying the search of plaintiffs' residence in March 1987 was supported by probable cause;

(2) The individual officers who obtained the warrant are shielded from liability under the qualified immunity doctrine;

(3) Defendants' [sic] failed to comply with the knock-notice requirement in effecting service of the warrant at plaintiffs' residence; and

(4) Defendants' failure to comply with knock-notice was not excused by exigent circumstances.

The Court will conduct a status conference for these actions on February 21, 1990, at 9:00 a.m.

IT IS SO ORDERED.

DATED: February 9, 1990.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

JERI L. THOMPSON, individually, and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor, Plaintiffs, v. CITY OF SANTA ROSA, et al., Defendants.	C-88-0874-DLJ C-88-0875-DLJ **ORDER** (Filed Dec. 27, 1990)
JOSEPH DESHETRES, Plaintiff, v. CITY OF SANTA ROSA, et al., Defendants.	

This Court heard defendants' motion for summary judgment on September 5, 1990. Rene Chouteau appeared for defendants. John H. Scott and Andrew Unetic appeared for plaintiff Joseph Deshetres. Leroy Lounibos, Jr. appeared for plaintiff Jeri Lynn Thompson. For all of the following reasons, the Court grants in part and denies in part defendants' motion.

I. BACKGROUND FACTS

This action for civil rights and tort law violations arises from the entry of plaintiffs' residence, pursuant to a search warrant, by officers of the Santa Rosa Police Department in March 1987.

At approximately 6:15 a.m. on March 17, 1987, a SWAT team led by Sergeant Michael Steen of the Santa Rosa Police Department entered plaintiffs' residence at 3365 Moorland Avenue in Santa Rosa. The officers had in their possession a search warrant signed by a magistrate.[1] In the previous week, the Santa Rosa police had observed a narcotics transaction which they believed to be linked to plaintiffs' residence, and they further believed that the residence served as a clubhouse for the Misfits Motorcycle Gang. As they approached the residence, the police were spotted by a man leaving the house, whom they recognized as Ricky Flowers, a member of the Misfits. Upon seeing the police, Flowers reversed his direction and moved towards the back of the residence, where he was later apprehended by the police.

Other officers surrounded the house, in accordance with an operational plan previously prepared by Sergeant Steen. Defendants Ed Hemphill and Keith Covington approached the front door with the intention of knocking and announcing the presence of the Santa Rosa police, and then, if necessary, forcibly entering the residence. Defendants David Albritton and Gary Reynolds went around to the side of the house and stood by the bathroom window and back bedroom window, respectively. Albritton's assignment was to apprehend anyone attempting to dispose of narcotics in the toilet or attempting to escape through the bathroom window during the

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[1] The Court provided a lengthy description of how officers from the Santa Rosa Police Department obtained the search warrant in its orders of February 9, 1990, and July 7, 1989. These orders are incorporated by reference here.

initial entry of the house. Reynolds' assignment was to break the bedroom window as a diversion for the officers entering the front of the house.

Upon seeing Flowers turn back to the residence, and fearing premature discovery of the police's presence, Sergeant Steen decided to abandon his intention to comply with the knock-notice requirements. Under orders from their Sergeant, Hemphill and Covington began dismantling the front door with a battering ram some 7 to 10 seconds after announcing their presence. No response had yet been heard from within.

The parties dispute what transpired after the police entered the house. As the non-moving parties on summary judgment, plaintiffs bear the burden of presenting admissible evidence that creates a triable issue of fact. For purposes of this motion, the Court assumes plaintiffs' version of the events occurring after the police entered their residence to be true.

At the time of entry, plaintiffs Joseph Deshetres, Jeri Lynn Thompson, and Ms. Thompson's infant daughter Nicole, were asleep in the back bedroom. Thompson was awakened by the noises coming from the front of the house and attempted to wake Deshetres. After a period of time Deshetres stumbled out of bed and moved towards the bedroom door. Soon after passing through the door frame, Deshetres was spotted by Officers Covington, Hemphill, and David Hayes, each of whom by this time had taken cover in Deshetres' living room. Officer Hemphill shot and wounded Deshetres. Officer Hayes and Officer Hemphill have testified that they saw a gun in Deshetres' right hand. Deshetres testified in deposition

that he could not remember whether or not he had a gun in his hand, and subsequently submitted a declaration that he did not point the gun at anyone. After being shot, Deshetres fell back into the bathroom where he could be seen by Officer Albritton through the window.

At and about the same time of the Deshetres shooting, Santa Rosa police officers in the house fired a number of shots. One shot struck and killed the family's labrador retriever, another shot, hit, and wounded one of their fellow officers, and other shots damaged the house and its contents.

During this period, Thompson could see Deshetres on the bathroom floor, and could see that he was bleeding badly. She also could hear the sounds of gunfire within the house. Under orders from Officer Reynolds, who had knocked out the bedroom window, Thompson remained seated on the bed wearing only a T-shirt and underpants. According to Thompson, Reynolds used profanity and threatened to kill her if she approached Deshetres or moved to put on more clothes. Reynolds then forced Thompson at gunpoint to pass her infant daughter to him through the broken bedroom window, while the shooting was still occurring. Thompson herself was then made to crawl through the bedroom window, whereupon she was quickly rushed into a police car.

This Court conducted a lengthy evidentiary hearing in this case in December 1989. In its order of February 9, 1990, the Court ruled that the entry into plaintiffs' residence on March 17, 1987 was an unreasonable search and seizure and thus violated the plaintiffs' constitutional rights. The Court specifically held that the officers failed

to comply with the knock-notice requirement in effecting service of the warrant at plaintiffs' residence, and that this failure to comply was not excused by exigent circumstances.

Plaintiffs Deshetres and Thompson filed separate, first amended complaints on March 12 and 13, 1990. Both complaints allege violations of the plaintiffs' civil rights under 42 U.S.C. § 1983 by Sergeant Steen, Officers Hemphill, Covington, Reynolds, and Albritton, Chief of Police Rosano, and the City of Santa Rosa (hereinafter "the City"). Deshetres' complaint also includes causes of action for assault and battery, and negligence against the City. In addition to these two causes of action, Thompson's complaint also seeks relief against the City for intentional infliction of emotional distress. The City's liability for these torts is based upon state law, which holds the City liable for the tortious acts of its agents.

Defendants previously moved for dismissal of the civil rights claims against each defendant, or, in the alternative, for summary judgment. At a hearing conducted on May 30, 1990, the Court found that defendants' motion was more properly treated as one for summary judgment, and consequently ordered additional briefing. The Court further instructed defendants to bring a supplementary motion for summary judgment as to plaintiffs' state law claims, so that all issues in these two cases could be consolidated into a single summary judgment motion.

II. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment

when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Recognizing that summary judgment motions can contribute significantly to the resolution of litigation when there is no factual issues, the Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed.R.Civ.P. 56(e) (emphasis added) and citing *Kaiser Cement Corp. v. Fischbach & Moore. Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986) and *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 106 S. Ct. at 2552. The mere existence of a scintilla of evidence in support of the nonmoving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). This Court thus applies to either a defendant's or plaintiff's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

III. DISCUSSION

Defendants now move for summary judgment in favor of all defendants on all of plaintiffs' claims. Regarding plaintiffs' civil rights claims, defendants move for summary judgment on grounds of qualified immunity and the absence of evidence establishing conduct depriving plaintiffs of their constitutional rights. As to plaintiffs' tort law claims, defendants move for summary judgment on grounds of lack of evidence of tortious conduct.

A. Plaintiffs' claims against Sergeant Steen under § 1983.

Defendants seek summary judgment in favor of Sergeant Steen on the issue of his liability under § 1983 for the entry into plaintiffs' residence by the Santa Rosa

Police Department in March 1987. Because this Court has already determined that Sergeant Steen's conduct violated plaintiffs' constitutional rights, *see* Order of February 9, 1990, the Court's inquiry focuses on whether or not Sergeant Steen is protected by qualified immunity.

The legal standards for qualified immunity are well settled. Sergeant Steen is entitled to qualified immunity if his search of plaintiffs' residence did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). The test is one of objective reasonableness, *Malley v. Briggs*, 106 S. Ct. 1092, 1097-98 (1986), which enables this Court to rule on the issue of qualified immunity as a matter of law, *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987).

An official may be entitled to immunity from suit even where, as with Sergeant Steen, he has violated a plaintiff's constitutional or statutory rights. This Court must separately determine whether or not the rights violated by Sergeant Steen were clearly established, and whether or not a reasonable person in Sergeant Steen's position could have failed to appreciate that his conduct would violate them. These inquiries relating to qualified immunity are distinct from the issue of the constitutionality of Sergeant Steen's conduct, even when the conduct in question involves rights under the Fourth Amendment. *See Anderson v. Creighton*, 107 S. Ct. at 3040-41.

Plaintiffs argue that the reasoning relied upon by this Court in previously finding a statutory and constitutional violation by Sergeant Steen precludes the application of

qualified immunity of civil damages. *See Kennedy v. Los Angeles Police Dep't.* 887 F.2d 920, 924 (9th Cir. 1989). Plaintiffs' argument is persuasive, as the Court indeed focused on the specific factual determinations made by Sergeant Steen, and concluded that he did not have a reasonable belief that compliance with the knock-notice requirement would endanger the safety of the officers. *See* Order of Feb. 9, 1990, at 18-27. Nevertheless, the Supreme Court has ruled that qualified immunity is not foreclosed to officials who are alleged to have violated the Fourth Amendment. *Anderson,* 107 S. Ct. at 3040-41. The Court therefore revisits the issue of whether Sergeant Steen's conduct violated clearly established statutory and constitutional rights of which a reasonable person would have known.

This Court reviewed at length the rules governing compliance with knock-notice, under both the Fourth Amendment and California Penal Code § 1531, in its Order of February 9, 1990. The Court finds that these constitutional and statutory standards were clearly established in March 1987 and provided guidance to police officers who regularly execute search warrants. In its Order of February 9, the Court also engaged in a fact-specific analysis regarding the reasonableness of Sergeant Steen's conduct. The Court concluded then, as it does now, that Sergeant Steen's decision to dispense with the knock-notice requirement was not objectively reasonable under the circumstances facing him at the time. The record in this case indicates that Sergeant Steen meticulously prepared for the execution of the search warrant at plaintiffs' residence, but that these plans were abruptly put aside when, upon approaching the residence, the

police officers concluded that their presence had been prematurely disclosed to plaintiffs.

For these reasons, as well as those stated in its February 9, 1990 Order, the Court finds that Sergeant Steen abandoned his intention to comply with the knock-notice requirements based upon an erroneous and unreasonable belief that exigent circumstances existed. Accordingly, Sergeant Steen is not entitled to the protection of qualified immunity in this case.

B. Plaintiffs' claims against the other officers under § 1983.

Four Santa Rosa police officers who assisted Sergeant Steen in executing the search warrant at plaintiffs' residence also move for summary judgment as to plaintiffs' civil rights claims.

The following facts, which in large part are undisputed, account for each office's role in entering plaintiffs' residence in March 1987. Officer Ed Hemphill gave the initial knock-notice, and, after repeating it, entered the plaintiffs' residence pursuant to Sergeant Steen's orders. Once inside, Hemphill shot and wounded Deshetres as he was coming out of a back bedroom. Officer Keith Covington assisted Hemphill in breaking down plaintiffs' front door with a battering ram, and then proceeded into plaintiffs' living room. Officers Albritton and Reynolds were stationed at the back side of the house at the time that Hemphill and Covington crashed through the front door. Albritton and Reynolds broke the bathroom and bedroom windows, respectively, shortly after Hemphill and Covington entered the residence. Albritton required

Deshetres to climb out the bath-room window after being shot. Reynolds forced Thompson at gunpoint to remain stationary in the bedroom after Deshetres had been shot, refused to allow her to dress, and then demanded that she pass her nine-month-old child out the bedroom window. Reynolds eventually ordered Thompson to also climb out the broken window, and then placed her into custody and handcuffed her.

Plaintiffs contend that these four defendants are liable under § 1983 not for their specific conduct after the break-in, but rather for their alleged personal participation in the knock-notice violation, which plaintiffs contend caused the injuries to Deshetres and Thompson. Thus, plaintiffs do not contend that Hemphill is liable under § 1983 for shooting Deshetres, nor do they contend that Officer Reynolds is liable under § 1983 for his conduct in taking Thompson and her daughter into custody. Plaintiffs stated at oral argument that their § 1983 claims against Officers Hemphill, Covington, Albritton, and Reynolds do not rely upon allegations of excessive force or false imprisonment. Instead, the conduct complained of is limited to the breaking down of plaintiffs' front door by Officers Hemphill and Covington, and the breaking of windows by Officers Albritton and Reynolds. Plaintiffs believe that these officers are, therefore, collectively and personally responsible for the unlawful search flowing from the knock-notice violation, and personally liable for all personal injuries and property damage which occurred thereafter, on the theory that the knock-notice violation is the proximate cause of such damage.

The Court finds that plaintiffs' theory of liability under § 1983 for these four defendants is without merit.

Plaintiffs cite a single legal authority, *Duke v. Superior Court*, 1 Cal.3d 314 (1969), for the proposition that these officers can be held liable under § 1983 for merely participating in an unlawful search. *Duke*, however, did not involve § 1983 or the imposition of personal liability. Rather, the California Supreme Court decided *Duke* in the context of the Fourth Amendment's exclusionary rule.

The legal standards for attaching personal liability for civil damages under § 1983 are altogether different. Individual liability must be based on an affirmative act, participation in the affirmative act of another, or failure to act where there is a duty to do so. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As stated recently by the Supreme Court, where the asserted violation is a deprivation of Fourth Amendment rights, the case is to be analyzed, in the § 1983 context, in terms of whether or not the individual conduct was objectively reasonable under the circumstances. *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989).

The record in this case does not include sufficient evidence to support a finding that Officers Hemphill, Covington, Albritton, and Reynolds were in possession of the same information as Sergeant Steen at the time they entered plaintiffs' residence. Moreover, the record does not contain evidence that any of these officers aided and abetted by counseling, advising, or encouraging Sergeant Steen to order entry into the house without complying with the knock-notice requirements. The Court cannot presume equivalent knowledge by these officers, and therefore the Court's fact-specific analysis regarding Sergeant Steen's actions, *see* Order of Feb. 9, 1990, is not relevant in evaluating whether or not their conduct was

objectively reasonable. Instead, the Court focuses on the undisputed fact that the officers were following the orders of Sergeant Steen in entering plaintiffs' residence. The decision to follow the orders of one's superiors is certainly objectively reasonable within the meaning of *Graham v. Connor.*

Additionally, the Court notes that individual liability under § 1983 requires proof that the individual conduct caused the injury or damage. In this case there is a clear lack of evidence to support a factual finding that Sergeant Steen's decision to enter plaintiffs' residence proximately caused the individual conduct of the officers after entry.

Because the Court finds that plaintiffs have failed to demonstrate that the conduct of these four officers violated § 1983, the Court does not reach the issue of whether or not plaintiffs' § 1983 claims against the officers are barred by the doctrine of qualified immunity.

For the foregoing reasons, the Court grants summary judgment in favor of defendants Hemphill, Covington, Albritton and Reynolds as to plaintiffs' civil rights claims under § 1983.

C. Municipal liability under § 1983.

Defendants move for summary judgment as to plaintiffs' claims against the City of Santa Rosa under § 1983. Plaintiffs contend that the City is liable for its alleged policy or custom of failing to comply with knock-notice requirements in executing police search warrants.

In 1978 the Supreme Court overruled its previous decisions on the subject and held that municipalities and

other local government units are "persons" to whom the Civil Rights Act of 1971 applies and that they may be sued for violations of 42 U.S.C. § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978). At the same time the Court held that the municipality cannot be liable solely because it employs a tortfeasor, *i.e.*, a municipality cannot be held liable under § 1983 on a *rescondeat superior* theory. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

To establish the liability of a municipality under § 1983 for unconstitutional acts by its employees, a plaintiff must show that the violation of his or her constitutional rights was caused by a municipal custom or policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79, 106 S. Ct. 1292, 1297-98 (1986). The plaintiff, however, need not show that the municipality has an explicitly stated rule or regulation; the inference that a policy existed may be drawn from circumstantial proof. *Monell*, 436 U.S. at 690-91, 98 S. Ct. at 2036 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S. Ct. 1598, 1613 (1970)).

In this case plaintiffs contend that the City is liable for its policy regarding knock-notice based on two separate theories. First, plaintiffs argue that Sergeant Steen created the City's knock-notice policy, and was delegated that authority by higher officials within the police department. Plaintiffs' argument relies heavily upon the Supreme Court decision in *Pembaur*, which held that municipal liability may be imposed for a single decision by a municipal policymaker. *Pembaur*, 475 U.S. at 480-81, 106 S. Ct. at 1298-99.

The Court finds the facts of *Pembaur* distinguishable from the present case. In *Pembaur*, a county prosecutor instructed police officers at the scene by telephone that a forcible entry into the offices of a medical clinic would be lawful. On these facts, the Supreme Court held that the prosecutor's instructions amounted to a policy decision which subjected the municipality to liability under § 1983. In the present case, Sergeant Steen made the decision at the scene within the space of seconds, without consulting any other City authorities, to abandon the knock-notice requirement after his initial plan in executing the search warrant had gone awry. Such conduct hardly amounts to a municipal policy decision. As the Supreme Court emphasized in *Pembaur*, "not every decision by municipal officers automatically subjects the municipality to section 1983 liability." 475 U.S. at 481, 106 S. Ct. at 1299. The Court finds that Sergeant Steen's decision in this case does not implicate municipal liability under the doctrine of *Pembaur*.

Second, plaintiffs argue that Sergeant Steen's violation of plaintiffs' constitutional rights was sufficiently ratified and adopted by policymakers to raise an inference of a pre-existing custom or policy. *See Grandstaff v. City of Border, Texas*, 767 F.2d 161 (5th Cir. 1985), *rehearing denied*, 779 F.2d 1129 (5th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1369 (1987). Plaintiffs contend that their evidence of ratification by the City sufficiently places a material fact in issue to preclude the granting of summary judgment to the City on this issue. The Court disagrees. *Grandstaff* concerned the issue of the municipality's conscious indifference to widespread reckless disregard for human life and safety among the

municipality's police force. The Fifth Circuit reasoned in that case that

> [w]here police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.

Id. at 170. This Court need not reach the issue of whether or not the Fifth Circuit's reasoning survives the decision of *City of Canton, Ohio v. Harris,* 109 S. Ct. 1197 (1989). Plaintiffs have presented no evidence that Sergeant Steen knew at the time of his decision that his disregard for the knock-notice requirements would be subsequently ratified or adopted by the City. Indeed, there is no testimony by Steen on this subject, nor is there any evidence of previous incidents where Steen or other Santa Rosa police officers failed to comply with knock-notice requirements. The Court therefore finds the reasoning of the *Grandstaff* case inapposite.

For the reasons stated, the Court finds that plaintiffs have presented insufficient evidence to support their contention that Sergeant Steen acted as a "municipal policymaker" within the meaning of *Pembaur* in ordering entry into plaintiffs' residence in March 1987. To elevate Sergeant Steen's hurried decision to enter the residence, on the facts of this case, to a decision by a municipal policymaker would be a broad and unreasonable extension of the *Pembaur* doctrine. The Court declines to embark on such a misguided course. Moreover, plaintiffs have presented insufficient evidence to place their case within the

ratification principle articulated in the *Grandstaff* decision. Rather, the Court finds that Sergeant Steen's actions in this case were not officially sanctioned or ordered by the municipality, and there-fore [sic] were not, properly speaking, acts of the municipality. *See Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38.

Accordingly, the Court grants summary judgment in favor of the City of Santa Rosa as to plaintiffs' claims under § 1983.

D. Plaintiffs' claim against Chief Rosano under § 1983.

Defendants also move for summary judgment as to plaintiffs' claims against Police Chief Rosano, based on the undisputed facts that he was not at the scene and did not participate in the search of plaintiffs' residence. Plaintiffs seek to impose liability under § 1983 against Chief Rosano both in his personal and official capacities.

To the extent that plaintiffs seek relief against Rosano in his official capacity as Chief of Police, the Court's analysis of legal and factual issues relevant to the motion for summary judgment is the same as that for the claim against the City itself. *Monell* held that suits against local government officials in their official capacities may be brought under § 1983, since they are simply another way of pleading an action against the entity of which the officer is an agent. *Monell*, 436 U.S. at 690 n.55, 98 S. Ct. at 2035 n.55. A suit against an official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2311 (1989).

Because this Court has already found that the City of Santa Rosa is not liable under § 1983 for Sergeant Steen's decision to forcibly enter plaintiffs' residence, and for these same reasons, the Court holds that plaintiffs' claim against Chief Rosano in his official capacity must also fail.

To the extent, however, that plaintiffs' action states a claim against Chief Rosano individually, the Court's analysis must be different. Although *Monell* teaches that a city is a "person" under § 1983, it must be remembered that that "person" is created by law and not by nature. When City of Canton states that a municipal "person" must act with "deliberate indifference" in order to be liable, the Supreme Court is defining a culpable state of mind for a mind that exists only as a legal fiction. Chief Rosano is, of course, a natural person with a real mind, and the suit against him individually must recognize that fact. If he is to be personally liable it must be because his personal actions, carried out with a culpable frame of mind he actually holds, cause a constitutional injury. The essential point is that the theories of liability used to assess municipal responsibility can support individual liability only where they are consistent with the elements of proof necessary to impose individual liability. As previously stated, these elements of proof include an affirmative act, participation in the affirmative act of another, or failure to act where there is a duty to do so. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Any such act or failure to act must be carried out with a personal frame of mind that is, at a minimum, deliberately indifferent to the constitutional rights of the plaintiff. *Sample v. Diecks*, 885 F.2d

1099, 1117-18 (3d Cir. 1989) (citing *City of Canton*, 109 S. Ct. at 1205)).

Plaintiffs present only threadbare evidence of Chief Rosano's personal participation in the violation of their knock-notice rights. Chief Rosano was informed of the operations plan prepared by Sergeant Steen before the service of the search warrant. Rosano declined to take any action with respect to the plan. In formulating the plan, however, Steen's intention was to comply with the knock-notice requirement in serving the search warrant. Only after arriving at the scene and concluding that the element of surprise had been taken away did Steen abandon his intention to comply with knock-notice. Plaintiffs have also demonstrated that Chief Rosano reviewed and approved the investigatory report of the police's entry into plaintiffs' residence. That report concluded that the officers involved in executing the search warrant had complied with Department policy.

Based on this showing of evidence of Chief Rosano's personal participation, the Court concludes that there is no disputed issue of material fact which bars summary judgment on this issue. Chief Rosano took no affirmative actions himself whatsoever regarding compliance with knock-notice before the incident in question, and he participated in Sergeant Steen's unlawful conduct only tangentially and only after the fact. Moreover, plaintiffs have failed to identify any failure to act by Chief Rosano where there existed a duty to do so that deprived them of their knock-notice rights. On this record, the Court also finds no evidence that Chief Rosano's personal frame of mind was deliberately indifferent to the constitutional rights of the plaintiff.

For these reasons, the Court holds that Police Chief Rosano is entitled to summary judgment as to plaintiffs' civil rights claims.

E. Plaintiffs' tort law claims.

Defendants move for summary judgment regarding plaintiffs' claims under state law for assault and battery, negligence, and emotional distress.

Although defendants' motion seeks summary judgment in favor of the same defendants sued under § 1983, plaintiffs' counsel stated at oral argument that their amended complaints name only the City of Santa Rosa as a defendant for the causes of action sounding in tort. Specifically, plaintiff Deshetres brings causes of action against the City of Santa Rosa for (1) the assault and battery committed by its agents and employees, and (2) the negligence of its agents and employees. Plaintiff Thompson brings causes of action against the City of Santa Rosa for (1) the assault and battery committed by its agents and employees, (2) the negligence of its agents and employees, and (3) the intentional infliction of emotional distress by its agents and employees.

Regarding plaintiff Deshetres' tort law claims, the Court finds that there exist disputed issues of material fact within the record of this case regarding whether or not Officer Hemphill shot Deshetres in self-defense, and whether or not the conduct of the City's agents and employees after entering plaintiffs' residence rises to the level of negligence. The Court further finds that disputed issues of material fact exist regarding plaintiff

Thompson's claims for assault and battery, and negligence. Finally, the Court is satisfied at this juncture that plaintiff Thompson has stated a prima facie case of intentional infliction of emotional distress, based on the conduct of Officer Reynolds in using profanity, threatening to shoot her, forcing her to give up her nine-month-old child, refusing to allow her to dress or to take cover from the gunfire, and forcing her to exit the residence through the broken bedroom window.

1. Civil Procedure Code § 262.1.

Notwithstanding the existence of disputed issues of material fact regarding plaintiffs' tort law claims, defendants move for summary judgment on grounds of immunity. Defendants first contend that plaintiffs' state law claims are barred by the immunity set forth in California Code of Civil Procedure § 262.1. Defendants argue that § 262.1 imposes an express duty among peace officers to execute a valid search warrant, and that these officers are immune from suit when they act reasonably in furtherance of the search warrant. *See Vallindras v. Mass. Etc. Ins. Co.*, 42 Cal.2d 149, 156 (1954). However, the Court is aware of no authority that suggests that § 262.1 protects conduct amounting to assault and battery, negligence, and intentional infliction of emotional distress. Whether the officers who entered plaintiffs' residence acted reasonably or unreasonably is a disputed fact in this case, and therefore the Court cannot rule on this issue as a matter of law. Accordingly, defendants are not entitled to summary judgment as to plaintiffs' state law claims on

grounds of immunity under California Code of Civil Procedure § 262.1.

2. Government Code § 820.2

Defendants also move for summary judgment on grounds of immunity under California Government Code § 820.2, which shields public employees from liability for any injury caused by their discretionary acts. If the individual officers who participated in the search of plaintiffs' residence are immune under § 820.2, then the City of Santa Rosa is also immune from liability. Cal. Gov't Code § 815.2(b); *see also Sullivan v. City of Sacramento*, 190 Cal. App. 3d 1070, 1080 (1987).

The issue before the Court thus narrows to whether or not the actions of Officers Hemphill, Covington, Albritton, and Reynolds were "discretionary" within the meaning of § 820.2. The underlying policy of the immunity provided by § 820.2 is to prevent second guessing of conduct by public officials where they are required to choose between alternative available courses of conduct in carrying cut their duties. The conduct at issue here, however, is not an available alternative. No one may choose to commit or not commit an assault and battery. The alleged tortious conduct by the police officers either happened or it did not happen. If it happened, it is not immune conduct within the meaning of California Government Code Section 820.2.

Accordingly, the Court holds that the City is not shielded by immunity under California Government Code §§ 815.2(b) and 820.2 as to plaintiffs' causes of

action for assault and battery, and as to Thompson's cause of action for intentional infliction of emotional distress. The Court further finds that the City is not shielded by immunity for plaintiffs' negligence causes of action.

IV. CONCLUSION

For all of the foregoing reasons, the Court ORDERS the following:

1. Defendants' motion for summary judgment in favor of Sergeant Steen as to plaintiffs' claims under § 1983 is DENIED.

2. Defendants' motion for summary judgment in favor of Officers Hemphill, Covington, Albritton, and Reynolds as to plaintiffs' claims under § 1983 is GRANTED.

3. Defendants' motion for summary judgment in favor of the City of Santa Rosa as to plaintiffs' claims under § 1983 is GRANTED.

4. Defendants' motion for summary judgment in favor of Police Chief Rosano as to plaintiffs' claims under § 1983 is GRANTED.

5. Defendants' motion for summary judgment in favor of the City of Santa Rosa as to plaintiffs' tort law claims is DENIED.

A status conference in this matter is scheduled for Wednesday, February 6, 1991, at 9:00 a.m.

IT IS SO ORDERED.

DATED: December 27, 1990.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

JERI L. THOMPSON, individually, and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor,

Plaintiffs,

v.

LARRY WAYNE MAHRE, et al.,

Defendants.

Consolidated Cases

C-88-0874-DLJ
C-88-0875-DLJ

ORDER

(Filed Jun. 27, 1994)

JOSEPH DESHETRES,

Plaintiff,

v.

LARRY WAYNE MAHRE, et al.,

Defendants.

On February 23, 1994, the Court heard defendant Michael Steen's motion for judgement as a matter of law and defendants' motion for judgment as a matter of law regarding the interpretation of the jury verdict. Leroy J. Lounibos of Lounibos, Lounibos & Tinney appeared for Jeri Lynn Thompson. Andrew Unetic and John Houston Scott appeared for plaintiff Joseph Deshetres. Rene Auguste Chouteau of the City Attorney's Office of Santa Rosa appeared for defendants.

I. BACKGROUND

A. Factual Background

This action for civil rights and tort law violations arose from the entry of plaintiffs' residence, pursuant to a

search warrant, by officers of the Santa Rosa Police Department in March of 1987.[1]

At approximately 6:15 a.m. on March 17, 1987, a SWAT team led by Sergeant Michael Steen of the Santa Rosa Police Department entered plaintiffs' residence at 3365 Moorland Avenue in Santa Rosa, California. The officers had in their possession a search warrant signed by a magistrate. In the previous week, the Santa Rosa police had observed a narcotics transaction which they believed to be linked to plaintiffs' residence, and they further thought that the residence served as a clubhouse for the Misfits Motorcycle Gang.

As they approached the residence, the police were spotted by a man leaving the house, whom they recognized as Ricky Flowers, a member of the Misfits. Upon seeing the police, Flowers reversed his direction and moved towards the back of the residence, where he was later apprehended by the police.

Other officers surrounded the house, in accordance with an operational plan previously prepared by Sergeant Steen. Defendants Ed Hemphill and Keith Covington approached the front door with the intention of knocking and announcing the presence of the Santa Rosa police, and then, if necessary, forcibly entering the residence. Defendants David Albritton and Gary Reynolds went

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[1] The background of this action has been set forth in the Court's prior Orders, *see, e.g.*, Order of December 27, 1990, portions of which is repeated for convenience. The Court's prior Orders are incorporated herein.

around to the side of the house and stood by the bathroom window and back bedroom window, respectively. Albritton's assignment was to apprehend anyone attempting to dispose of narcotics in the toilet or attempting to escape through the bathroom window during the initial entry of the house. Reynolds' assignment was to break the bedroom window as a diversion for the officers entering the front of the house.

Upon seeing Flowers turn back to the residence, and fearing premature discovery of the police's presence, Sergeant Steen decided to abandon his intention to comply with the knock-notice requirements. Under orders from their Sergeant, Hemphill and Covington began dismantling the front door with a battering ram some 7 to 10 seconds after announcing their presence. No response had yet been heard from within.

The parties dispute what exactly transpired after the police entered the house. Plaintiffs claims that at the time of entry, plaintiffs Joseph Deshetres, Jeri Lynn Thompson, and Ms. Thompson's infant daughter Nicole, were asleep in the back bedroom. Thompson was awakened by the noises coming from the front of the house and attempted to wake Deshetres. After a period of time, Deshetres alleges that he stumbled out of bed and moved towards the bedroom door. Soon after passing through the door frame, Deshetres was spotted by Officers Covington, Hemphill, and David Hayes, each of whom by this time had taken cover in Deshetres' living room. Covington claims to have continued to announce police presence when entering the living room.

Deshetres appeared around the corner of the kitchen door frame. Officer Hemphill shot and wounded Deshetres when he saw Deshetres holding a gun. Both Officer Hayes and Officer Hemphill have testified that they saw a gun in Deshetres' right hand. Officer Covington also fired at Deshetres. Covington also claims to have seen Deshetres armed with a gun. Deshetres. testified in deposition that he could not remember whether or not he had a gun in his hand, and subsequently submitted a declaration that he did not point the gun at anyone. After being shot, Deshetres fell back into the bathroom where he could be seen by Officer Albritton through the window.

Albritton broke out the window and ordered Deshetres to exit through the broken bathroom window. Deshetres claims that he was forced to walk naked down the street to an ambulance.

At and about the same time of the Deshetres shooting, Santa Rosa police officers in the house fired a number of shots. One hit and wounded a fellow officer. Other shots damaged the house and its contents.

During this period, Thompson, still in the bedroom holding her baby, could see Deshetres on the bathroom floor, and could see that he was bleeding badly. She also could hear the sounds of gunfire within the house. Under orders from Officer Reynolds, who had knocked out the bedroom window, Thompson remained seated on the bed wearing only a T-shirt and underpants. Reynolds then forced Thompson at gunpoint to pass her infant daughter to him through the broken bedroom window. Thompson herself was then made to crawl through the bedroom

window, whereupon she was quickly rushed into a police car. At trial, testimony was given that the family's labrador retriever was killed after it was perceived to be hampering the movements of officers within the house. Deshetres was hospitalized for nine days and incurred medical expenses.

B. Procedural Background

In February 1988, plaintiffs commenced these consolidated actions in Sonoma County Superior Court. Defendants removed both actions to this Court on March 10, 1988.

On July 7, 1989, the Court denied defendants' and plaintiff Deshetres' motions for partial summary judgment on several issues, but did find that the issuance of the nighttime service endorsement of the search warrant was valid.

In December 1989, the Court conducted a lengthy evidentiary hearing. In its order of February 9, 1990, the Court ruled that although the warrant underlying the search of plaintiffs' residence was supported by probable cause, the entry into the residence on March 17, 1987 was an unreasonable search and seizure and thus violated the plaintiffs' constitutional rights. The Court specifically held that the officers failed to comply with the knock-notice requirement in effecting service of the warrant at plaintiffs' residence, and that this failure to comply was not excused by exigent circumstances.

Plaintiffs Deshetres and Thompson, individually and as guardian ad litem for her daughter Nicole Leah

Thompson, then filed separate, first amended complaints on March 12 and 13, 1990, respectively. Both complaints alleged violations of the plaintiffs' civil rights under 42 U.S.C. § 1983 by Sergeant Steen, Officers Hemphill, Covington, Reynolds, and Albritton, Chief of Police Salvatore Rosano, and the City of Santa Rosa (hereinafter "the City"). Both complaints also included causes of action for assault and battery, and negligence. In addition to these two causes of action, Thompson's complaint also sought relief for intentional infliction of emotional distress. These emotional distress causes of action were dropped at trial. Plaintiffs sought damages, punitive damages, attorneys' fees, and costs.

Defendants previously moved for dismissal of the civil rights claims against each defendant, or, in the alternative, for summary judgment. At a hearing conducted on May 30, 1990, the Court found that defendants' motion was more properly treated as one for summary judgment, and consequently ordered additional briefing. The Court further instructed defendants to bring a supplementary motion for summary judgment as to plaintiffs' state law claims, so that all issues in these two cases could be consolidated into a single summary judgment motion.

On December 27, 1990, the Court denied defendants' motion for summary judgment on plaintiffs' section 1983 claim against Sergeant Steen, but granted defendants' motion for summary judgment on the section 1983 claim for defendants Hemphill, Covington, Albritton, Reynolds, Rosano, and the City of Santa Rosa. The Court denied the City's motion for summary judgment as to plaintiffs' tort law claims.

In January 1991, defendant Steen appealed to the Ninth Circuit Court of Appeals that portion of the Court's Order which denied him qualified immunity from liability to plaintiffs under section 1983. In a five-page memorandum opinion filed on April 2, 1992, the Circuit affirmed this Court's ruling on qualified immunity. On June 3, 1992, the Court of Appeals denied Steen's petition for rehearing with suggestion for a rehearing en banc. On November 2, 1992, the U.S. Supreme Court denied Steen's petition for certiorari.

On June 11, 1993 plaintiffs' motion for summary judgment on their 42 U.S.C. § 1983 claim against defendant Steen was denied and a trial date was set for November 1, 1993.

At an eight day trial that concluded on November 30, 1993, a jury awarded plaintiff Deshetres $82,000 for his civil rights claim against defendant Steen and awarded plaintiff Thompson $10,000 for her civil rights claim against Steen. The jury also found that while there had not been an assault or battery against plaintiff Thompson, there had been negligence by officers of the City of Santa Rosa police department. The jury found the negligence proximately caused damages to Thompson of $21,000. The jury fund that Jeri Lynn Thompson's negligence damages were 70% caused by the City of Santa Rosa, 20% caused by Jeri Lynn Thompson's negligence, and 10% caused by Joseph Deshetres' negligence.

II. DISCUSSION

A. Standard for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) provides that:

> [w]henever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after the entry of judgment.

A renewed motion for judgment as a matter of law, also referred to as a motion for judgment notwithstanding the verdict ("JNOV"), is proper to raise when a motion for judgment as a matter of law, otherwise known as a directed verdict, has been denied. Fed. R. Civ. P. 50(b). A Rule 50(b) motion must be preceded by a motion for directed verdict at the close of all evidence. *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 183 n.9 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990). In addition, the motion must be made on the same grounds as the directed verdict motion. *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990).

In this case, after the close of evidence and prior to closing arguments, in a conference call with counsel on November 24, 1993 at 4:00 p.m., the Court announced that it was denying defendant's motion for qualified immunity.

A judgment notwithstanding the verdict is proper if:

> the evidence construed in the light most favorable to the nonmoving party permits only one reasonable conclusion as to the verdict and that conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict. *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d at 181 quoting *Fleming v. Dep't of Public Safety*, 837 F.2d 401, 408 (9th Cir.), *cert. denied*, 109 S. Ct. 222 (1988).

Or, as one court stated, a jury verdict may be set aside if manifest injustice will result if allowed to stand. *See Marley v. City of Allentown*, 774 F. Supp. 343, 344 (E.D. Pa. 1991), *aff'd*, 961 F.2d 1567 (3d Cir. 1992).

B. Standard for Qualified Immunity

Under the doctrine of qualified immunity, police officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). However, even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police officer could have believed that the conduct involved was legal. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038-39 (1987). Thus the availability of qualified immunity depends upon the " 'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the

time it was taken." *Anderson,* 107 S. Ct. at 3038 (1987) (quoting *Harlow,* 102 S. Ct. at 2738-39).

Development of the qualified immunity doctrine reflects a "balance between the evils inevitable in any available alternative." *Harlow,* 102 S. Ct. at 2736. On the one hand, claims for damages against police officers may "offer the only realistic avenue for vindication of constitutional guarantees." *Id.* On the other hand, unfounded claims against police officers impose costs on both the officers and society, including the expense of litigation, and the diversion of energy from legitimate police duties. *Id.; Anderson,* 107 S. Ct. at 3038. As a balance between these competing interests, qualified immunity is designed to permit "insubstantial" lawsuits to be terminated quickly. *Harlow,* 102 S. Ct. at 2736. Defendants bear the burden of establishing the defense of qualified immunity. *Benigni v. Hemet,* 879 F.2d 473, 479 (9th Cir. 1988).

C. Application of the Qualified Immunity Standard

Plaintiffs suggest this Court has already resolved the qualified immunity issue. Plaintiffs note that the Court conducted a four day evidentiary hearing that concluded on December 15, 1989. The Court issued an Order on February 9, 1990 holding that defendant's failure to comply with knock-notice was "not excused by exigent circumstances." In an Order filed December 27, 1990 this Court stated that it had reviewed "at length" the rules governing compliance with knock-notice under both the Fourth Amendment and California Penal Code § 1531. The Court found:

> these constitutional and statutory standards were clearly established in March 1987 and provided guidance to police officers who regularly execute search warrants. In its Order of February 9, the Court also engaged in a fact-specific analysis regarding the reasonableness of Sergeant Steen's conduct. The Court concluded then, as it does now, that Sergeant Steen's decision to dispense with the knock-notice requirement was not objectively reasonable under the circumstances facing him at the time. The record in this case indicates that Sergeant Steen meticulously prepared for the execution of the search warrant at plaintiffs' residence, but that these plans were abruptly put aside when, upon approaching the residence, the police officers concluded that their presence had been prematurely disclosed to plaintiffs.
>
> For these reasons, as well as those stated in its February 9, 1990 Order, the Court finds that Sergeant Steen abandoned his intention to comply with the knock-notice requirements based upon an erroneous and unreasonable belief that exigent circumstances existed. Accordingly, Sergeant Steen is not entitled to the protection of qualified immunity in this case.

The Ninth Circuit affirmed this Court's decision when it was brought on interlocutory appeal. The Ninth Circuit held that "[a]ppellant has not set forth any legal or factual basis to undermine the district court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity." Defendant Steen's petition to the United States Supreme Court for a writ of certiorari was denied.

The Court has resolved many of the factual allegations regarding the presence of exigent circumstances here. Indeed, none of defendant's arguments present new facts or legal arguments which require the Court to alter its prior Orders.

However, plaintiff is incorrect in asserting that this Court's prior decision has been somehow set in stone by the Ninth Circuit. The Ninth Circuit ruling denying defendant Steen's interlocutory appeal stated that the result of its ruling was "to return the qualified immunity issue to the District Court for determination on its merits." Further, plaintiff's position that "constitutional questions of law are ultimately decided by Judges rather than police experts" (Plaintiffs' Opposition at 6) incorrectly implies that a constitutional violation precludes application of qualified immunity. As defendant observes, such a position would require that any constitutional violation negate the possibility of qualified immunity being granted. In *Floyd v. Laws* the Ninth Circuit held that the test must be "whether in light of the clearly established law and the information available to [the officer], a reasonable person in [the officer's] position could have objectively believed his actions to be proper." 929 F.2d 1390, 1394 (9th Cir. 1991) citing *Anderson,* 483 U.S. at 641.

Defendant Steen presents various grounds for this Court to find that he is entitled to qualified immunity. Specifically, Steen argues he is entitled to qualified immunity because: (1) his decision to order forcible entry was discretionary; (2) he reasonably relied on his own training and accepted police practices; (3) knock-notice was justifiably dispensed with because the suspect knew the

police were coming; (4) a reasonably competent officer would have a reasonable fear of armed resistance justifying dispensing with knock-notice; or (5) a reasonably competent police officer could conclude that reasonable fear of armed resistance also justified rapid entry after the officers identified themselves. Steen's contentions are described below briefly.

1. Steen's Decision Was Discretionary

Steen cites *United States v. Phelps* for the proposition that the decision to order expedited entry was discretionary. 490 F.2d 644, 647 (9th Cir. 1974)("There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case").

2. Steen's Decision Reflected Reasonable Reliance on Police Training

Steen cites *Floyd, supra,* for the proposition that he is entitled to qualified immunity if he reasonably relied on "other authority" to justify his decision. That is, Steen offered testimony at trial from other officers and his training programs that his conduct was not unreasonable.

3. Steen's Decision Involved a Suspect Who Knew the Police were Coming

Steen cites *Ker v. California* to demonstrate that where the officers had information that indicated the suspect "might well have been expecting the police" knock-notice

could be dispensed with. 374 U.S. 23, 40 (1963). Here, as the officers had arrived they had seen a member of the gang, Flowers, reverse direction and apparently move to the back of the house to alert plaintiffs to the arrival of the police.

4. Steen's Decision Involved an Officer with a Reasonable Fear of Armed Resistance.

Steen notes that knock-notice has not been required where prior announcement would create a "palpable peril to the life or limb of the arresting officers." *United States v. Smith*, 456 F.2d 1236 (9th Cir. 1972); *States v. Manfredi*, 722 F.2d 519 (9th cir. 1983) (compliance excused where suspect was a "violent person" and had a gun); *United States v. Turner*, 926 F.2d 883 (9th Cir. 1991) (no-knock entry permitted where suspect heard to say he kept a firearm to use against police).

Further, Steen argues here there was some announcement, and that in tandem with the exigent circumstances, expedited forcible entry was proper. In *United States v. Bonner*, entry after 10 seconds was permitted where there was a clear showing of physical danger to the police. 874 F.2d 822 (D.C. Cir. 1989).

However, all of Steen's contentions must fail. None of the evidence cited from the trial was significantly different from the evidence available at the four day evidentiary hearing. The Court's February 9, 1990 Order considered a variety of exigent circumstances, including plaintiff Deshetres' arrest record, a previous attempt to serve upon Deshetres, Deshetres' membership in a gang with a violent reputation, the presence of other vehicles

alongside the house, a drug transaction believed to have occurred a week earlier at the house, and the possibility of premature disclosure of police presence by the Mr. Flowers, the driver of a white pick-up truck. Order at pp. 22-27. That Order concluded that defendants failure to comply with the knock-notice requirement was not "excused by exigent circumstances."

Defendants' experts did not offer new insight into the specific situation confronting Officer Steen. In many cases, the expert testimony was premised on hypothetical findings of fact. For instance, while Benedict Tisa testified regarding the training he gives police officers in "high risk" situations, this Court has previously discounted as unreasonable many of the assumptions officer Steen held about the danger that was posed. Steen premised his plan in part on the assumption that many more Misfit members would be inside the residence, that the other occupants would aid Deshetres in fighting off the police, and that resistance could be expected at that early an hour. Moreover, similar expert testimony by Tisa, and assertions as to training by Steen, had been presented in evidentiary hearings and previous summary judgment motions.

D. Causation

Defendant quite briefly argues that there is no causation as a matter of law because: (1) plaintiffs received the functional equivalent of knock-notice from Mr. Flowers and (2) the period of time required to use the battering ram provided plaintiffs the 20-23 second delay the Court

found would have occurred if proper knock-notice had been provided.

In its previous Order of June 11, 1993 the Court denied summary judgment to plaintiffs because they could not satisfactorily establish causation. The Court concluded:

> From these facts, a jury could reasonably conclude that plaintiffs received notice of the police and elected to ignore the police presence rather than answer the front door. The jury could find that Deshetres intended to confront the police with armed force, regardless of whether Steen waited ten seconds, ten minutes, or ten hours to enter. Under such a determination, a jury could find that plaintiffs' injuries would have occurred anyways and, thus, that defendant's violation did not cause plaintiffs' damages.

The jury has now considered and resolved this issue. The verdict forms directly ask whether the damages at issue were proximately caused by defendants' actions, and look to award damages only if such a connection can be shown. It is not certain that plaintiffs received the functional equivalent of knock-notice from Mr. Flowers or that the period of time required to use the battering ram provided comparably proper knock-notice. In such a circumstance, the evidence construed in the light most favorable to the nonmoving party does not permit only one reasonable conclusion as to the verdict "and that conclusion is contrary to the jury's." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d at 181 quoting *Fleming v. Dep't of Public Safety*, 837 F.2d 401, 408 (9th Cir.), *cert. denied*, 109 S. Ct. 222 (1988). On this issue, "reasonable minds" are capable of agreeing with the verdict. *Id.*

E. Defendants' Motion for Judgment As a Matter of Law Re: Interpretation of Jury Verdict

Defendants argue that jury verdicts should be consistent. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355 (1962). Further, they point out that the obvious intention of the jury should be satisfied. *Curtis v. San Pedro Trans. Co.*, 10 Cal.App.2d 547 (1935).

Here, the jury returned awards for plaintiff Thompson of $10,000 on a civil rights claim against defendant Steen and $21,000 on a negligence claim against the City of Santa Rosa. The jury found the City 70% responsible (or liable for $14,700) for the negligence damages.

Defendants suggest that the award against Steen was subsumed in the award against the City. The civil rights award, in other words, is "based on the very same acts that plaintiff Thompson bases her claim for negligence." Defendants Reply Memorandum at 2. Defendants assert that the $10,000 sum should not be double counted and that plaintiff Thompson should recover only $17,500 not $27,500.

However, the jury instructions were clear that, while there may be overlap between the two causes of action, one was not a simple subset of the other. In describing the § 1983 claim the Court noted:

> Thus, in essence, you will be required to resolve two issues. First, whether plaintiff Deshetres or Thompson would have responded within thirty seconds and acknowledged the police request for entry. Secondly, if you find that either or both plaintiffs would have

> acknowledged the police presence within a thirty second delay and would have permitted them to enter, you must determine whether or not any specific damages were proximately caused to Deshetres or Thompson by *Steen's violation of knock notice and premature entry to the residence.* (Emphasis added).

In contrast, the second claim went to the behavior of all Santa Rosa officers, and was not necessarily reliant upon Steen's failure to provide knock-notice.

> Plaintiff Thompson's *second claim* is that conduct by the *City's officers'* was negligent, and that conduct caused injury to the plaintiff during the course of the incident.
>
> A plaintiff who was injured as a result of some negligent conduct on the part of a defendant is entitled to recover compensation for such injury from that defendant.

Here, the front door was shattered, windows were broken, and plaintiff Thompson was treated roughly. Thompson was threatened at gun point, made to give up her child, and forced to climb through a broken window in a semi-clothed condition. Thompson found her residence in a disheveled state when she returned home. These injuries do not necessarily stem from the actions alleged to have given rise to the § 1983 injuries. Accordingly, this motion must be denied.

III. CONCLUSION

For the foregoing reasons, the Court:

1. DENIES defendant Michael Steen's motion for judgement as a matter of law; and

2. DENIES defendants' motion for judgment as a matter of law regarding the interpretation of the jury verdict.

3. Plaintiffs shall submit a proposed form of judgment by July 27, 1994. Defendants may offer an opposition by August 10, 1994. The judgment will then be under submission.

IT IS SO ORDERED

Dated: June 27, 1994

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

JERI L. THOMPSON, individually, and as guardian ad Litem for NICOLE LEAH THOMPSON, a minor, Plaintiffs, v. LARRY WAYNE MAHRE, et al., Defendants.	)	C-88-0874 DLJ C-88-0875 DLJ **JUDGMENT**
JOSEPH DESHETRES, Plaintiff, v. LARRY WAYNE MAHRE, et al., Defendants.	)	(Filed Sep. 27, 1994)

This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED that judgment is hereby entered in accordance with the jury verdict rendered November 30, 1993. A true and accurate copy of the Verdict is attached hereto as Exhibit A and incorporated herein by reference.

Wherefore it appearing that by reason of the Verdict:

IT IS ADJUDGED, ORDERED, AND DECREED that Plaintiff Joseph Deshetres recover $82,500.00 from Defendant Michael Steen.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that Plaintiff Jeri L. Thompson recover

$10,000.00 from Defendant Michael Steen plus an additional $14,700.00 from Defendant City of Santa Rosa.

In addition, the Plaintiffs are entitled to costs and attorney fees from Defendants Michael Steen and the city of Santa Rosa to be determined by the Court upon motion.

DATED: September 27, 1994

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERI L. THOMPSON, individually, and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor,

Plaintiffs,

v.

LARRY WAYNE MAHRE, et al.,

Defendants.

JOSEPH DESHETRES,

Plaintiff,

v.

LARRY WAYNE MAHRE, et al.,

Defendants.

Verdict

C-88-0874-DLJ
C-88-0875-DLJ

VERDICT NO. 1

PLAINTIFF DESHETRES' CIVIL RIGHTS CLAIM

No.1(a) We the jury find that the plaintiff, Joseph Deshetres, has proven by a preponderance of the evidence that had defendant Michael Steen waited another 20 to 23 seconds before ordering forcible entry, plaintiff Deshetres or Thompson would have responded to the knock notice of the Santa Rosa police and would have permitted the police to enter.

Yes X

No __

If you answer question 1(a) "Yes" then you are to consider answer question 1(b). If you answer question 1(a) "No" then you are to sign this verdict form and return it to the Court. Whatever your decision as to Verdict No. 1, you are to consider Verdict No. 2 and Verdict No. 3.

No.1(b) We the jury find that the plaintiff Joseph Deshetres has proven by a preponderance of the evidence that the failure of defendant Michael Steen to wait additional time before ordering forcible entry of the residence proximately caused damage to plaintiff Deshetres and that defendant Steen must pay plaintiff Deshetres an award of money in the amount of $82,000.

Dated: 11-30-93

/s/ Gerrie Lujan
Foreperson

VERDICT NO. 2

PLAINTIFF THOMPSON'S CIVIL RIGHTS CLAIM

No.2(a) We the jury find that the plaintiff, Jeri Lynn Thompson, has proven by a preponderance of the evidence that had defendant Michael Steen waited another 20 to 23 seconds before ordering forcible entry, plaintiff Deshetres or Thompson would have responded to the knock notice of the Santa Rosa police and would have permitted the police to enter.

Yes X

No __

If you answer question 2(a) "Yes" then you are to consider answer question 2(b). If you answer question 2(a) "No" then you are to sign this verdict form and return it to the Court. Whatever your decision as to Verdict No. 2, you are to consider Verdict No. 3.

No.2(b) We the jury find that the plaintiff Jeri Lynn Thompson has proven by a preponderance of the evidence that the failure of defendant Michael Steen to wait additional time before ordering forcible entry of the residence proximately caused damage to plaintiff Thompson and that defendant Steen must pay plaintiff Thompson an award of money in the amount of $10,000.

Dated: 11-30-93

/s/ Gerrie Lujan
Foreperson

VERDICT NO. 3

PLAINTIFF THOMPSON'S CLAIMS
UNDER STATE LAW

No. 3(a): We the jury find that the plaintiff, Jeri Lynn Thompson, has proven by a preponderance of the evidence that a police officer of the City of Santa Rosa committed an assault upon her.

Yes __

No X

If you answer question 3(a) "Yes" then you must answer question 3(b). If you answer "No" proceed to question No. 4.

No. 3(b): We the jury find that plaintiff Jeri Lynn Thompson has proven by a preponderance of the evidence that the assault committed upon her proximately caused damage to her and that the defendant City of Santa Rosa must pay plaintiff Jeri Lynn Thompson an award of money in the amount of $_____.

No. 4(a): We the jury find that the plaintiff, Jeri Lynn Thompson, has proven by a preponderance of the evidence that the defendant, City of Santa Rosa, intentionally did an act which resulted in a harmful or offensive contact with the plaintiff's person and that plaintiff did not consent to the contact and that the harmful or offensive contact caused injury, damage, loss or harm to the plaintiff.

Yes __

No X

If you answered question 4(a) "Yes" then you must answer question 4(b). If you answer question 4(a) "No" then you should proceed to question 5(a).

No. 4(b): : We the jury find the plaintiff, Jeri Lynn Thompson has proven by a preponderance of the evidence that she is entitled to actual and compensatory

damages against the defendant, City of Santa Rosa, for battery in the amount of $_____.

No. 5(a): We the jury find that the plaintiff, Jeri Lynn Thompson, has proven by a preponderance of the evidence that the negligent conduct by a police officer of the City of Santa Rosa during the execution of a search warrant on March 17, 1987 caused damage to plaintiff Jeri Lynn Thompson.

Yes X

No __

If you answered question 5(a) "No" sign the verdict form. and return it to the Court. If you answer question 5(a) "Yes" then you must answer question 5(b).

No. 5(b): We the jury find that plaintiff Jeri Lynn Thompson has proven by a preponderance of the evidence that the negligent conduct of an officer of the City of Santa Rosa proximately caused damages to her in the amount of $21,000.

If you answered question 5(b) "no damage" sign the verdict and return it. If you answer question 5(b) with an amount of money, answer question 5(c).

No. 5(c) We the jury find that the defendant has proven by a preponderance of the evidence that the plaintiff Jeri Lynn Thompson's negligence and/or the negligence of plaintiff Deshetres was a proximate cause

of the damages she suffered. We further find that assuming that 100% represents the total negligence which was the cause of Jeri Lynn Thompson's damages, the percentage of this 100% due to the contributory negligence of plaintiff Thompson and/or plaintiff Deshetres was:

City of Santa Rosa's Negligence	70 %
Jeri Lynn Thompson's Negligence	20 %
Joseph Deshetres' Negligence	10 %
Total	100 %

Dated: 11-30-93

/s/ Gerrie Lujan
Foreperson

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JERI LYNN THOMPSON, individually, and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor,

Plaintiffs,

v.

LARRY MAHRE, et al.,

Defendants.

JOSEPH DESHETRES,

Plaintiff,

v.

LARRY MAHRE, et al.,

Defendants.

Consolidated Cases

C-88-0874-DLJ
C-88-0875-DLJ

NOTICE OF APPEAL

(Filed Oct. 21, 1994)

Defendant Michael Steen appeals to the United States Court of Appeals for the Ninth Circuit from those portions of the final Judgment filed by the District Court on September 27, 1994, which awarded plaintiff Joseph Deshetres $82,500.00 from defendant Michael Steen and awarded plaintiff Jeri L. Thompson $10,000.00 from defendant Michael Steen for alleged violation of their federal civil rights.

Without limiting the scope of his appeal from the Judgment, defendant Michael Steen also appeals (a) the District Court's order filed February 9, 1990, which determined that defendant Michael Steen violated the Fourth Amendment to the Constitution in deciding to expedite entry into plaintiffs' premises to serve a search warrant; (b) the District Court's order on or about November 23, 1993, denying defendant Michael Steen's Rule 50(a) motion claiming qualified immunity; and (c) the District Court's order filed June 27, 1994, denying defendant's motion for judgment as a matter of law.

The parties to the Judgment appealed from and the names and addresses of their respective attorneys are as follows:

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Dated: October 19, 1994

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